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No. 89-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WESLEY P. BERNARD, *et al.*,

Petitioners,

v.

GULF OIL CORPORATION, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

(1) Was the decision of the court below, which is inconsistent with Griggs v. Duke Power Co., 401 U.S. 424 (1971), and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), compelled by Wards Cove Packing Co. v. Atonio, 104 L.Ed.2d 733 (1989)?

(2) Where the basis of a district court decision is erroneous, may an appellate court, consistent with Pullman-Standard v. Swint, 456 U.S. 273 (1982), make its own de novo findings of fact in order to affirm that decision on a new alternative ground?

(3) Was the decision of the court below, which is inconsistent with Teamsters v. United States, 431 U.S. 324 (1977),

compelled by Lorance v. A T & T Technologies, 104 L.Ed.2d 961 (1989)?

(4) Where a plaintiff establishes a prima facie case of intentional discrimination under Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), can that prima facie case be rebutted by post-trial argument of defense counsel?

PARTIES

The petitioners are Wesley P. Bernard, Hence Brown, Rodney Tizeno, Willie Johnson, Doris Whitley, and the class of all blacks employed in hourly positions at the Port Arthur refinery of the Gulf Oil Corporation, on or after December 26, 1966, who have not executed releases of their claims.

The respondents are Gulf Oil Corporation, Chevron U.S.A. Inc., successor in interest to the Gulf Oil Corporation, Chevron Corporation, parent company of Chevron U.S.A. Inc., the Oil Chemical and Atomic Workers' International and its Local No. 4-23.

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In The

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October Term, 1989

WESLEY P. BERNARD, et al.,

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v.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioners Wesley P. Bernard, et al., respectfully pray that a writ of certiorari issue to review the judgments and opinions of the Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

This case was last before this Court in 1981. Gulf Oil Co. v. Bernard, 452 U.S.

89 (1981). On remand the district court issued two successive opinions. The first, reported at 643 F. Supp. 1495 (E.D. Tex. 1986), is set out at pp. 209a-256a of the Appendix. The second district court decision, which is not officially reported, is set out at pp. 135a-208a of the Appendix. There were on remand two appellate opinions as well. The first, reported at 841 F.2d 547 (5th Cir. 1988), is set out at pp. 45a-134a of the Appendix. The most recent court of appeals decision, reported at 890 F.2d 735 (5th Cir. 1989), is set out at pp. 1a-44a of the Appendix.

JURISDICTION

The most recent decision of Fifth Circuit was entered on December 18, 1989. On March 7, 1990, Justice White signed an order extending the date for filing this petition to April 17, 1990. Jurisdiction

of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are set forth in Appendix C.

STATEMENT OF THE CASE

This class action was originally filed in 1976 by six present or retired black employees of the refinery operated in Port Arthur, Texas, by the Gulf Oil Corporation. The plaintiffs alleged that they had been subjected to a variety of racially discriminatory practices, in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq., and 42 U.S.C. § 1981. Named as defendants were Gulf and the Oil Chemical and Atomic Workers' International Union and its Local 4-23.

The district court, shortly after the filing of the complaint, granted summary judgment to the defendants. The Fifth

Circuit reversed, and ordered that the claims be tried on the merits. The district court in 1976 had entered an order enjoining plaintiffs' counsel from discussing the case with members of the putative class which they represented. The Fifth Circuit, sitting en banc, held that that order violated the First Amendment. 619 F.2d 459 (5th Cir. 1980) (en banc). This Court granted certiorari with regard to the disputed gag order, and struck it down on non-constitutional grounds. 452 U.S. 89 (1981).

On remand, the district court initially certified a class of all blacks who had worked or applied for work at the refinery in union covered jobs after December 26, 1966. A year later, shortly before the case was to be tried on the merits, the district court modified that certification order to exclude a

substantial number of class members. (48a-50a) The case was tried in April, 1984. In September 1986, the district court issued its first opinion on the merits of the underlying claims, ruling for the defendants on all issues. (209a-265a).

The Fifth Circuit reversed, and directed the district court to reconsider its disposition of a number of the discrimination claims. (45a-134a) On remand the district court again ruled in favor of the defendants on all issues. (135a-208a) On appeal the defendants argued that the case was controlled in a number of important respects by this Court's intervening decisions in Wards Cove Packing Co. v. Atonio, 104 L.Ed.2d 733 (1989)and A T & T Technologies v. Lorance, 104 L.Ed.2d 961 (1989).[1] The Fifth Circuit

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[1] Appellees Supplemental Brief, No. 88-6141 (5th Cir.)

affirmed the decision of the district court. (1a-44a).

STATEMENT OF THE FACTS

Gulf Oil's Port Arthur refinery, originally opened at the turn of the century, has for many decades employed a substantial number of black workers. Prior to 1954 the refinery was overtly structured along racial lines. Whites and blacks worked together in the same departments, but were classified separately for seniority and personnel purposes, and belonged to different unions.

> [T]he . . . integrated departments functionally had two separate lines of progression, one for their white employees and the other for the black employees. . . . These integrated departments had distinct seniority rosters, one denoted "White" ... and the other denoted "Colored".... Although black laborers worked in many of the same departments as white ... employees, they could not bid into the more desirable white lines of progression.

(59a-60a). In 1954 several black employees insisted on transferring into previously "white" jobs; the company and union responded by suspending promotions for a two-year period. (60a-61a).

Between 1954 and 1956 a nominal restructuring occurred at the refinery. The refinery was ostensibly divided into two major divisions, the "Operating and Mechanical Division," and the "Labor Division." In reality, however, this was simply a relabeling of the old "White" and "Colored" jobs.

> The composition of th[e] departments and subdepartments and their lines of progression remained basically unchanged . . . . The labels on the seniority rosters in these integrated departments were changed from "White" to "Operating and Mechanical Division" and from "Colored" to "Labor Division."

(61a-62a). At the same time that it created these two Divisions, Gulf adopted several rules which expressly restricted

workers in the all-black Labor Division from transferring into the all-white Operating and Mechanical Division. No employee in the Labor Division was permitted to transfer into an O&M job unless he or she had a high school diploma and could pass a number of written tests; whites in the O & M Division, however, could freely transfer into other O & M jobs without meeting those requirements. As a practical matter few whites had ever taken the tests at issue, and many lacked high school degrees.[2] Transferees from the Labor Division lost all but one-day of their seniority. The Fifth Circuit acknowledged that these three barriers were adopted in

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[2] PX 17 (In 1965, of 69 Opertor No. 1's whose education could be determined, 33 lacked a high school degree); PX 19 (In 1960, of 99 pipefitters, 56 lacked a high school degree.)

1956 for the purpose of preventing blacks from moving into O & M jobs. (73a-76a).

Those three barriers were rescinded in 1963 as a result of pressure from the federal government. (66a). This litigation concerns the practices and barriers which remained in place after 1963, and which continued for years thereafter to prevent blacks in the Labor Division from moving into jobs in the O & M Division.

(1) Promotion Tests

Many of the most desirable positions at the refinery are craft jobs; there are more than a dozen distinct crafts, including carpenters, painters, boiler- makers, and pipefitters. Persons selected for a craft position first enter a "mechanical training program" that lasts several years; upon completing that program they become number one craftsmen. Prior to

1967 there were virtually no blacks in craft jobs or the mechanical training programs. 841 F.2d at 561.

Vacancies in mechanic trainee positions are ordinarily posted for bid, and selections are made on the basis of seniority. Since 1947 Gulf has, somewhat intermittently, used written examinations to screen applicants for mechanic trainee positions. From 1947 to 1971 Gulf used a set of tests known as the Old Tests; since 1971 Gulf has used a different set, referred to as the New Tests. 841 F.2d at 561. On a number of occasions, however, Gulf has exempted employees from these tests; as of 1970 a majority of the white craftsmen had in fact never taken the test.[3]

The district court found that both sets of tests had an adverse impact,

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[3] DX 94, 95; PX 23, 24.

screening out a disproportionately large portion of black senior bidders for mechanic trainee positions. The comparative pass rates were as follows:

	Pass Rate	
	Old Tests	New Tests
Blacks	42.8%	66.0%
Whites	82.5%	97.7%

(98a) Petitioners contended below, and the lower courts found, that the test had an unlawful disparate impact in violation of Title VII. See Griggs v. Duke Power Co., 401 U.S. 424 (1971). The central issue at this point in the litigation is whether the tests were job-related.

(2) Stipulation 29

Under ordinary circumstances Gulf promoted an average of approximately 15 employees a year into mechanic trainee

positions.[4] In 1967, however, Gulf and the OCAW entered into a special agreement, known as Stipulation 29, pursuant to which 203 employees were summarily classified into mechanic trainee positions. None of these positions were ever posted or opened for seniority based bids, the manner in which trainee positions were normally filled both before and after 1967. The employees promoted under Stipulation 29 were also exempted from the Old Tests then in use to screen employees seeking craft trainee positions. The shear size of this unique en masse promotion was so great that for years thereafter Gulf made virtually no further promotions into the affected crafts. Under Stipulation 29, for example, 100 employees became pipefitter

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[4] DX 110; PX 87. No new craft trainees were added in 1965, and only 12 were selected in 1966. Id.

trainees in early 1967; the next pipefitter trainee was not selected until 1972. (PX 87.) Of the 203 employees promoted under Stipulation 29, 194 were white.

The Fifth Circuit agreed that the massive ad hoc promotions under Stipulation 29, accomplished outside of the normal promotion rules, had an adverse effect on blacks:

> [W]e hold that Stipulation 29 had an adverse impact on blacks at a substantially higher rate than on whites. The record indicates that only 4.4% of employees reclassified as Mechanical Trainees by Stipulation 29 were black and that, due to Gulf's pre-Act seniority system, 100% of the employees in the Utility Man classification in the Labor Division (in 1966) were blacks, with, almost universally, more seniority than whites reclassified as Mechanic Trainees. ... In 1967 many blacks lost the <u>opportunity</u> to use their superior seniority to bypass junior whites and as a consequence arrived at top positions at a later time than they would have absent Stipulation 29.

(90a-94a) (Emphasis in original). Because of the many decades in which they had been

unable to use their accumulated seniority, blacks were the most senior bidders on 40% of the craft vacancies that were filled under the normal rules in this era;[5] the Stipulation 29 promotions, however, accounted for the vast majority of all craft trainees selected during the seven years from 1965 to 1972, inclusive.

In the courts below petitioners claimed that Stipulation 29 was adopted with a discriminatory motive, and was intended as a preemptive strike to provide to relatively junior whites the equivalent of 10 years of promotions before more senior blacks, invoking their rights under Title VII, could bid on those jobs. Petitioners also maintained that Stipulation 29 had an unlawful disparate impact, because it had a proven adverse

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[5] DX 131;, PX 25.

impact on blacks and was not justified by business necessity.

(3) The Seniority System

Petitioners asserted in the lower courts that the Gulf-OCAW seniority system unlawfully perpetuated the effects of past discrimination. The seniority rules perpetuated past discrimination in much the same manner as in other seniority cases which this Court has reviewed. Most operating (i.e. non-craft) jobs at the refinery were arranged in lines of progression. (57a-58a) When a vacancy arose, promotions were made on the basis of seniority, but only workers in the job immediately below the vacancy could bid on the position. Since all O & M jobs had for decades been deliberately limited to whites, many of the operating jobs were held by whites with far less seniority than large numbers of blacks in the Labor

Division. Thus under the seniority rules a desirable position could be awarded to a white, in the line of progression at issue, with only 10 years of seniority, ahead of blacks who had 20 or 30 years of seniority but were in the Labor Division. That was the practice even where, as was the case before and after 1965, black workers classified in the Labor Division in practice actually worked in the very department in which the vacancy arose. As of 1965 there were a total of 85 positions at the refinery paying over $3.50 per hour; under the seniority rules no blacks were eligible to bid on 72 of those jobs. (PX 37, 38) Between 1965 and 1970 Gulf promoted a total of 47 workers into No. 1 operator jobs, the best paid operating position; despite the fact that there were large numbers of blacks with many decades of

seniority, only one of these promotions went to a black. (DX 98)

The central issue in the courts below was whether this seniority system was bona fide within the meaning of section 703(h) of Title VII. See Teamsters v. United States, 431 U.S. 324 (1977).

(4) The Individual Claims

Several of the named plaintiffs alleged that they had unlawfully been denied promotions to supervisor because of their race. The district court initially rejected two of these claims because the two plaintiffs, Hayes and Brown, had never applied for appointment to the position of supervisor. (202a). The Fifth Circuit in 1988 reversed on the ground

> that supervisory vacancies were not announced prior to 1982 and that no application process existed. It is not legally sufficient for an employer to reject an employee who does not

> have notice or an opportunity to apply for a promotion.

(127a-128a). The district court in its first opinion rejected the promotion claim of the third plaintiff, Tizeno, on the ground that he had failed to prove "that he was better qualified" than the white who won the disputed promotion. (215a). The court of appeals 1988 opinion reversed this as well, holding as a matter of law that a Title VII plaintiff need not prove that he or she is better qualified than the white actually promoted. (129a). See Patterson v. McLean Credit Union, 105 L.Ed.2d 132, 157-58 (1989).

On remand in 1988 the district court again rejected all three promotion claims, and petitioners appealed. The Fifth Circuit held in 1988 that Tizeno had made out a prima facie case (129a), and assumed in 1989 that Hayes and Brown had done so as

well. (38a) The legal issue at this juncture is whether Gulf met its burden under Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981), to produce "evidence that plaintiff was rejected . . . for legitimate, non-discriminatory reasons."

REASONS FOR GRANTING THE WRIT

This aging Title VII case starkly illustrates the difficulty faced by Title VII plaintiffs who must, in Judge Posner's recent words "negotiate the treacherous and shifting shoals of present day federal employment discrimination law." Malhotra v. Cotter & Co., 885 F.2d 1305, 1313 (7th Cir. 1989). This case was originally filed in 1976. The district court promptly dismissed the complaint, and enjoined plaintiffs' counsel from communicating with the class they represented; both orders were overturned on appeal, but these pre-

trial disputes were not finally resolved until this Court's 1981 decision in the instant case, some five years after the complaint was originally filed. The case was tried in the spring of 1984; after a two year delay the district court finally issued a decision on the merits in the fall of 1986. An appeal, a remand, and yet another appeal followed.

At this juncture most of the legal issues in this case turn on opinions issued by this Court many years after the complaint was first filed. The most recent Fifth Circuit decision turns in particular on decisions handed down by this Court in June, 1989, 13 years after the case began, and 5 years after it was tried.

I. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE DECISION BELOW, WHICH CONFLICTS WITH GRIGGS v. DUKE POWER CO., 401 U.S. 424 (1971), AND ALBEMARLE PAPER CO. v. MOODY, 422 U.S. 405 (1975), WAS COMPELLED BY WARDS COVE PACKING CO. v. ATONIO, 104 L.Ed.2d 733 (1989)

Fifteen years ago in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), this Court set out in detail and with precision "the appropriate standard of proof for job relatedness" in a disparate impact case. 422 U.S. at 436. Had the most recent Fifth Circuit decision in the instant case been handed down in 1980 or 1985, review would have been sought on the ground that the decision conflicted both with Albemarle and with Griggs v. Duke Power Co., 401 U.S. 424 (1971), as well as with the prevailing law in numerous circuits. In the wake, however, of Wards Cove Packing Co. v. Antonio, 104 L.Ed.2d 733 (1989), neither

litigants nor lower court judges can assert with any confidence that even the most implausible of tests or other job requirements might not be legally "job related." Certiorari should be granted here for the same reason it was granted in Albemarle, to clarify "the showing required to establish . . . 'job relatedness'". 422 U.S. at 413.

We ask the Court, not to overturn Wards Cove, but merely to explain it. The new substantive standard announced in Wards Cove is "whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." 104 L.Ed.2d at 752. Whatever the Court meant by this new phrase cannot be divined by orthodox legal research; in the 17 years between Griggs and Watson v. Fort Worth Bank & Trust Co., 101 L.Ed.2d 827 (1988), there is not a single lower

court decision utilizing or referring to such a standard. Wards Cove reduces the burden on an employer in a disparate impact case from a burden of proof to a burden of production, 104 L.Ed.2d at 753; just how much evidence an employer must produce is obscured, not only by the novelty of the underlying standard, but by the Court's insistence that Griggs and its progeny should all along have been understood in this way. The lower courts, until a year ago, uniformly read Griggs in precisely the opposite manner.

The lower courts do understand that the purpose and effect of Wards Cove is to make it more difficult for plaintiffs to prevail in disparate impact cases. In the ten months since Wards Cove was decided, it appears that no circuit court in the country, reaching the merits of a case for

the first time,[6] has sustained a disparate impact claim. There is agreement that Wards Cove eliminated the "necessity" in what had long been characterized by federal courts at all levels as the "business necessity defense," e.g., Allen v. Seidman, 881 F.2d 375, 377 (7th Cir. 1989); but what Wards Cove may have established in place of that familiar standard remains entirely obscure.

The Fifth Circuit in the instant case read Wards Cove as virtually eviscerating Griggs and Albemarle. It is difficult to say whether that conclusion is inconsistent with the broad language in Wards Cove. But the Fifth Circuit had no doubt that Wards Cove required it to sustain in this case

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[6] Plaintiffs have prevailed only in a case where a defendant asked the appellate court to set aside its own earlier liability finding. Green v. USX, 52 FEP Cas. 168 (3d Cir. 1990) (refusing to set aside 1988 Third Circuit opinion).

tests that combined the very characteristics which had led this Court to condemn the tests at issue in Griggs and Albemarle; indeed, one of the tests sustained below was among the very tests disapproved by this Court in Griggs and Albemarle.

Griggs emphasized at the outset that the particular tests in that case functioned as a barrier preventing blacks from entering the very jobs which the company had for years expressly limited to whites. 401 U.S. at 427. The Court asserted, without even mentioning the possibility of a business necessity justification, that

> [u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

401 U.S. at 430. The tests at issue in this case have exactly the same effect as those in Griggs, freezing the effects of past discrimination. Here the tests were used to reject applicants for craft jobs; prior to 1955 blacks were overtly barred from those jobs, and from 1955 to 1963 black were excluded by means of job requirements which the court of appeals held were racially motivated. As of 1965, out of several hundred craftsmen at the Gulf refinery, not one was black.[7] The promotion test used by Gulf after 1971 (the "New Test") was particularly effective in singling out blacks for rejection. Over 90% of the employees who failed that test were black; conversely, over 97% of all

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[7] The first black craftsman, a painter, became No. 1 craftsman in 1967. PX-87.

whites passed the New Test. (PX 27; DX 108).

Both Griggs and Albemarle thought it particularly fatal to a claim of job relatedness that in those cases many whites had been promoted without ever being required to meet then job requirements imposed on blacks. In Griggs and Albemarle whites had escaped the disputed requirements because they had been promoted into the units at issue before the requirements were adopted. In Griggs the Court emphasized

> [t]he evidence . . . shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used.

401 U.S. at 432. The Court thought this practice probative evidence that the new requirements were not needed. Similarly the Court stressed in Albemarle:

> Incumbents in the skilled lines, some of whom had been hired before adoption of the tests, were not required to pass them to retain their jobs or promotion rights. The record shows that a number of white incumbents in high ranking job groups could not pass the tests.

422 U.S. at 429.[8]

The same circumstance which weighed so heavily against the job requirements in Griggs and Albemarle was present in this case. As of 1970[9] the majority of the white craftsmen in the largest crafts had been promoted without ever having taken the disputed tests.[10] The circumstances in the instant case are even more egregious than

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[8] See also 422 U.S. at 434 ("incumbent employees are permitted to work at even high-level jobs without passing the company's test battery.")

[9] The limitations period in this case runs from 1966.(99a).

[10] Of 140 boilermakers, 93 had never taken the Old Test. Of 176 pipefitters, 114 had never taken the Old Test. DX 94, 95; PX 23, 24.

in Griggs and Albemarle, where whites had avoided the job requirements simply because they were promoted before those requirements were instituted. Here Gulf, having established the tests as a prerequisite to promotion in 1947, proceeded to exempt large numbers of employees, virtually all of them white, from that very requirement. Between 1967 and 1971, for example, 292 employees were admitted to craft programs; of this group, however, 203 had been exempted from the tests and 194 of those exemptions had gone to whites. (DX 110; 86a).

Albemarle explained that a job requirement with adverse impact could be used if it was "predictive of or significantly correlated with important elements of work behavior." 422 U.S. at 431. (Emphasis added) Griggs emphasized that any such requirements "must measure

the person for the job and not the person in abstract." 401 U.S. at 436. What actually occurred in this case is a parody of the abuse condemned in Albemarle and Griggs. One of the largest crafts for which Gulf used the disputed tests, for example, was boilermaker; Gulf's own supervisors, when asked to describe the most important duties of boilermakers, responded that they needed to be able to work with hand tools, to work at heights over four feet, and to work outside. (See Appendix A) Gulf might plausibly have required employees seeking this position to demonstrate manual dexterity, a good sense of balance, or an ability to function in hot or cold temperatures. Instead Gulf utilized tests requiring applicants to demonstrate a good vocabulary, proficiency at mathematics, and knowledge of

chemistry.[11] It is not to be believed that English professors are especially good with their hands, that mathematicians work well on high platforms, and that chemists are especially adept at laboring outside in a sweltering Texas summer. Conversely, Gulf's supervisors, being expressly queried about these issues, acknowledged that reading, mathematics and chemistry were all of little or no significance to the work of a boilermaker.[12] The district court expressly held that black workers who failed the disputed tests in large numbers, generally had the abilities and experience

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[11] 95a n. 35; 96a n. 36.

[12] Asked to evaluate the importance of various reading skills for the work of boilermakers, the supervisors rated them 20th, 2nd, 28th, 34th, 44th and 76th in overall importance. Various mathematical abilities were rated 15th, 21st, 29th, and 68th in importance. Understanding of chemistry was rated 46th. DX 162.

required to carry out the duties of craftsmen.[13]

In the instant case, of course, Gulf did not claim that proficiency in reading or mathematics was related to or predictive of proficiency with a hammer or a drill. Instead, Gulf offered an ingeniously circular form of validity study. Rather than inquire whether high scoring employees were more adept at such manual tasks, Gulf asked its supervisors to assess which workers had a greater "ability" in reading and mathematics. (DX 162) Not surprisingly, employees whom supervisors thought adept at reading and mathematics had done

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[13] 237a ("[M]ost of Plaintifs actual duty elements involved abilities Plaintifs should have already earned in the Labor Division. For example, each aspiring craftsman had already acquired the basic hands-on skills in the use of tools and materials.")

well on the company's reading and math test.

Albemarle also emphasized that, even where a test was valid with regard to one job, only under rare circumstances could an inference be drawn that the test was valid for some other job. In Albemarle, although the tests at issue were utilized in 13 lines of progression, the company attempted a validity study with regard to only 7 of those lines. 422 U.S. at 413. The study itself purported to find a significant correlation between job performance and test scores for only about one half of the studied jobs. 422 U.S. at 432. The Court in Albemarle refused to permit an inference of validity as to the jobs not studied, or regarding the jobs for which no correlation had been found.

> Even if the study were otherwise reliable, this odd patchwork of results would not entitle

> Albemarle to impose its testing program under the [EEOC] Guidelines. A test may be used in jobs other than those for which it has been professionally validated only if there are "no significant differences" between the studied and unstudied jobs . . . [T]he study's checkered results appear to compel the opposite conclusion.

422 U.S. at 432.

The business justification adduced by Gulf in the instant case suffers from the very flaw condemned by this aspect of Albemarle. Gulf actually used the tests at issue to make promotions into 14 craft positions.[14] Gulf limited its validity study to only five of these crafts, and claimed to have found a significant correlation as to only two, boilermaker and

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[14] The 14 crafts were boilermaker, pipefitter, welder, carpenter, instrument man, bath-house mechanic, garage mechanic, heavy equipment operator, insulator, maintenance mechanic, painter, tinner and lead, junior drafting technician and junior estimator.

pipefitter. (107a) Gulf's study revealed that all welders performed equally well regardless of their test scores. The study regarding carpenters and instrument men failed to show any significant correlation because the employee rating criteria Gulf utilized were so unrelated to the actual work of these craft workers that their supervisors could not agree on how to rate particular employees. (107a n. 41) Gulf's own analysis of the duties of lab technicians and instrument mechanic, two of the crafts for which the tests were used, showed they had little in common with the duties of boilermakers and pipefitters. (See Appendix B). Gulf did not undertake any comparison of the duties of boilermakers and pipefitters with the duties of most of the crafts for which no study was attempted; the company did not, and could not, claim that painters,

carpenters, pipefitters and laboratory technicians, four of the diverse crafts at issue, do essentially the same thing. This is precisely the sort of crazy quilt pattern which Albemarle insisted would preclude inferring that a test was valid for a job which had not been studied, or regarding which a study had shown no correlation.

Albemarle warned, finally, against attempting to infer the validity of one test from evidence that another test was job related. In that case the employer used two forms of the Wonderlic Test, which were "in theory, identical and interchangeable measures of verbal facility". 422 U.S. at 431-32. But when an actual validity study was conducted, the two versions of the test yielded strikingly different results; in three instances the study indicated that one form of the test

was valid, but the other was not. In the instant case Gulf, having adduced a validity study regarding the post-1971 New Tests, urged the courts to infer from that evidence that the pre-1971 Old Tests were also valid. Here, unlike Albemarle, it was conceded that the sets of tests were in fact quite different.[15] It is also undisputed that the Old Tests were scored far more stringently than the New Tests.[16] Gulf's failure to directly validate the Old Tests was particularly inexcusable because

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[15] The Old Tests included both a test of reading comprehension and the Wonderlic Personnel Test; neither are part of the New Tests. Conversely, two of the four New Tests concern chemical comprehension and learning ability, elements not encompassed within the Old Tests. (95a n. 35; 96a n. 36).

[16] Only 2.3% of whites failed the New Tests, whereas 17.5% of whites failed the Old Tests. Among blacks the failure rates were 34% and 57.2% on the New and Old Tests respectively.

it knew when they were still in use that the tests might well not be valid.[17]

Measured against the standard in Griggs and Albemarle, the defendants' claim of job relatedness should have been dismissed out of hand. The defense adduced in this case suffers from virtually every flaw condemned in Griggs and Albemarle. Indeed, this case involves the very same test that was condemned by this Court in Griggs and Albemarle, the Wonderlic Personnel Test. Compare 95a n.35 with Griggs, 401 U.S. at 428 and Albemarle, 422 U.S. at 432. The correlations which Gulf claimed to have found in this case between its tests and actual job performance were far smaller

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[17] PX 6, Letter of Port Arthur Personnel Director to Consultant on Validation, February 17, 1969, ("we realize that we may not be able to validate some, or perhaps all, of these tests for the purpose for which we use them.")

than the correlations relied on by the defendant in Albemarle.[18]

The district court, however, held that it was obligated to sustain the tests in light of the new, "rather lighter" standard of business justification in Watson v. Ft. Worth Bank and Trust Co., 101 L.Ed.2d 827 (1988). (185a). The Fifth Circuit, relying on Wards Cove and Watson, concluded that it too was required to sustain the tests at issue. The impact of Wards Cove on the appellate court can be discerned in several critical differences between the Fifth Circuit's 1988 and 1989 opinions. In 1988 the Fifth Circuit directed the trial court to consider the results of all five validity studies, not just the two that had produced results favorable to the company

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[18] Compare Albemarle, 422 U.S. at 437 (correlations of .50, .50, .64, .75, .76, and 1.00), with DX 162, p. 38 (correlations as low as .14).

(116a); in 1989 the Fifth Circuit no longer regarded the three unfavorable studies as relevant, and held that the tests were job related, inter alia, for selecting welders, despite the undisputed fact that the job performance of low-scoring welders was in reality identical to the job performance of high scoring welders.[19] Similarly, in 1988 the Fifth Circuit insisted that the courts could not determine the validity of the tests without first resolving conflicting evidence regarding how frequently, or

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[19] Gulf's testing expert testified as follows:

> "A. ... Welders were not included because there was no real performance difference ...
>
> Q. In other words, whether a welder had a high score or a low score on a test, his job performance was about the same?
>
> A. That is correct."

Tr. 1084-85.

infrequently, high scoring applicants performed better on the job, i.e. the "correlation coefficient (113a-115a); in 1988 the Fifth Circuit no longer thought this issue important, sustaining the tests without bothering to decide how often test scores correlated with job performance. (28a-29a) The panel read Watson in particular to require federal courts to attach heavy weight to the mere fact that an employer believed in good faith that its tests were job related. Where a substantial dispute arises regarding job relatedness,

> [t]his court will refrain from making business decisions for an employer . . . . "[I]t must be borne in mind that '[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." Watson, ___ U.S. ___.

(35a). Both Griggs and Albemarle had previously refused to attach any weight or significance to an employer's belief in the wisdom of its own practices. If, as the Fifth Circuit construed Watson to hold, such a good faith belief can defeat a disparate impact claim, Griggs, and its progeny have collapsed back into a requirement that a Title VII plaintiff prove discriminatory intent. Certiorari should be granted to resolve whether, as the courts below concluded, Wards Cove and Watson have largely eviscerated Griggs and Albermarle.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE DECISION BELOW, WHICH CONFLICTS WITH TEAMSTERS v. UNITED STATES, 431 U.S. 324 (1977), WAS COMPELLED BY LORANCE v. A T & T TECHNOLOGIES, 104 L.Ed.2d 961 (1989)

This Court held in Teamsters v. United States, 431 U.S. 324 (1977), that a seniority system which perpetuates the

effect of past discrimination does not violate Title VII unless the seniority system itself is not bona fide. 431 U.S. at 348-56. Teamsters indicated that the bona fides of a system turn, inter alia, on the motives underlying the original creation of the system. The Court stressed that the seniority system in that case "did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose." 431 U.S. at 356. (Emphasis added). The same principle was applied in United Airlines v. Evans, 431 U.S. 553 (1977). Four years ago this Court, in explaining Evans, emphasized that the plaintiff in that case "had made no allegation that the seniority system itself was intentionally designed to discriminate." Bazemore v. Friday, 478 U.S. 385, 396 n.6 (1986). Bazemore, made

clear that a practice adopted prior to 1965 for racial reasons "became a violation upon Title VII's effective date". 478 U.S. at 395. American Tobacco Co. v. Patterson, 456 U.S. 63 (1982), insisted that "Teamsters places no importance on the date the seniority system was adopted, and we follow Teamsters by refusing to distinguish among seniority systems based on date of adoption." 456 U.S. at 76 n.16. In Pullman-Standard v. Swint, 456 U.S. 273 (1982), this Court evaluated at length evidence regarding the motives of parties responsible for the creation of a seniority system in the 1940's and 1950's.

Teamsters, Bazemore and American Tobacco hold that a seniority system created or structured prior to 1965 for racial reasons is not bona fide under Title VII. The opinions below are clearly in conflict with this Court's decisions in

Teamsters, Bazemore and American Tobacco. The Fifth Circuit in 1988 correctly concluded that the basic structure of the Gulf-OCAW seniority system was erected with a discriminatory purpose. The so-called "Labor" and "Operations and Maintenance" Divisions created in 1956, as the Fifth Circuit acknowledged, were simply a relabeling of the old "Colored" and "White" jobs. Employees who worked side by side in the same department were classified into different Divisions, seniority rosters and unions. Again, the distinctions were made along strictly racial lines, conforming to the prior "Colored" and "White" job rosters. The Fifth Circuit properly "inferr[ed] discriminatory intent from Gulf's pre-Act seniority system." (76a).

The courts below held, however, that it was legally irrelevant that prior to 1965 certain critical aspects of the

seniority system had been framed for racial reasons. They deemed such discriminatory genesis to be legally irrelevant, insisting that only additional post-act discriminatory motives could render a system non-bona fide. The Fifth Circuit's 1988 opinion, while acknowledging the original racial purpose of the seniority lines, commented

> [W]e question whether a seniority system ... could ever be held unlawful solely because of pre-Act discrimination. That the 1963 changes did not rectify the effects of past discrimination, and in fact operated in some ways to lock those effects in, does not imply, in the absence of purposeful discrimination in connection with the post-Act system, that this system was not bona fide under § 703(h).

(76a). (Emphasis added). On remand the district court insisted it understood the 1987 appellate opinion to render legally irrelevant any discrimina-tory motive in

the pre-Act creation of the seniority system:

> The Court of Appeals concluded that the seniority system at Gulf could not be found other than bona fide based solely on discrimination occurring before the effective date of Title VII.

(182a). On appeal petitioners urged in vain that this holding was inconsistent with Teamsters and Bazemore. The respondent company argued that

> genesis ... is not controlling. Under Teamsters, there is redemption if the employer goes on to sin no more after the effective date of the Act.[20]

The company relied in particular on the recent decision in Lorance v. A T & T Technologies 101 L.Ed.2d 961 (1989).[21] The Fifth Circuit embraced that view of section 703(h), reiterating that pre-Act

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[20] Brief for Appellees, No. 88-6141 (5th Cir.), p. 16.

[21] Appellee's Supplemental Brief, No. 88-6141 (5th Cir.) pp. 12-13.

discrimination in the creation of a seniority system was in its view legally irrelevant:

> The class ... argu[es] that, while pre-Act discrimination in hiring and assignment will not make a post-Act seniority system which is otherwise bona fide illegal, a pre-Act seniority system which discriminated will make an otherwise bona fide post-Act seniority system illegal. This contention was rejected in our earlier opinion....

(11a-12a). (Emphasis in original).

This aspect of the Fifth Circuit's decision is clearly inconsistent with the holdings in Teamsters, Bazemore and American Tobacco that a seniority system is not bona fide if it had its genesis in discrimination. But it is less clear whether, in this regard, Teamsters, Bazemore and American Tobacco are still good law after Lorance v. A T & T Technologies, 104 L.Ed.2d 961 (1989). The plaintiffs in Lorance claimed that the

seniority provisions at issue there was adopted for discriminatory reasons; that provision had been fashioned after 1965, but more than 300 days before the plaintiffs' EEOC charge. 104 L.Ed.2d at 969. The plaintiffs relied on the passage in Teamsters, quoted above, emphasizing the importance of the genesis of a seniority system. 104 L.Ed.2d at 971. This Court, however, held that the charge in Lorance was untimely, utilizing language which could conceivably be construed to call into question this aspect of Teamsters, Bazemore and American Tobacco.

Earlier this term the defendant in another longstanding Title VII case advanced the view of Lorance evidently accepted by the Fifth Circuit below. Pullman Standard v. Swint, 107 L.Ed.2d 307

(1989).[22] The Court disposed of Swint without reaching that question. This is an important and recurring issue, and certiorari should be granted to resolve it.

III. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S DECISION IN PULLMAN STANDARD V. SWINT, 456 U.S. 273 (1982)

In 1967 respondent, acting pursuant to Stipulation 29, promoted 203 employees, 95% of them comparatively junior whites, into lucrative craft training positions. The legality of this mass promotion is of central importance in this litigation, not only because of the large

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[22] Brief for Respondent in Opposition, No. 88-1602, p. 17 ("Petitioners' challenge to the validity of a facially neutral seniority system adopted in 1954 is time barred. The departmental seniority system challenged in this case was established as a result of the 1954 collective bargaining agreement. . . . Under the Court's Lorance v. AT&T decision, a Title VII challenge to a racially neutral seniority system, as here, requires the filing of a charge with EEOC within 180 days of adoption of the system or it is time-barred.")

number of jobs at issue, but also because it affects the bona fides of the seniority system. (13a-18a) In 1987 the court of appeals held that Stipulation 29 had an adverse effect on senior blacks, and remanded the case for further consideration. Petitioners urged both that Stipulation 29 was racially motivated, and that Stipulation 29 had an unlawful disparate impact not justified by business necessity.

On remand the district court upheld the legality of Stipulation 29, rejecting both the disparate treatment and disparate impact claims. The district court's decision was based on its view that Stipulation 29 had altered both the lines of progression and the assignment rules for craft workers:

> Stipulation 29 essentially eliminated all jobs in the maintenance craft lines of promotion except the No. 1

> Craftsman, the Mechanic Trainee, and the Truck Driver Classification.... Before Stipulation 29 was implemented, the maintenance crafts were characterized by complex lines of promotion.... By increasing the number of "universal mechanics", i.e. people who can perform any job associated with a particular craft, Stipulation 29 further increased productivity.

(140a-145a). The correctness of this finding is not seriously at issue; it was palpably false. The actual terms of Stipulation 29 do not eliminate jobs, alter lines of progression, or alter assignment rules;[23] all Stipulation 29 did was provide for the 203 disputed promotions. In the subsequent appeal, respondents declined to defend or refer to this mistaken finding, and the Fifth Circuit properly did not credit it. (21a).

Because the district court's approval of Stipulation 29 turned on a pivotal but

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[23] The terms of Stipulation 29 are set out at p. 81a n. 23.

clearly erroneous finding of fact, Pullman Standard v. Swint, 456 U.S. 273 (1982), left the appellate court with two options. First, the Fifth Circuit could have remanded the issue to the district court for further findings untainted by the misunderstanding regarding the substance of Stipulation 29. Second, the appellate court could have resolved the legality of Stipulation 29 if that issue turned solely on a question of law.

Instead, disregarding the admonition of Swint, the Fifth Circuit proceeded to take the very step for which it had been reversed in Swint itself -- making its own findings of fact. The appellate court filled the evidentiary gap regarding Stipulation 29 by finding that in 1967 Gulf suddenly needed a large number of additional craft workers: "Gulf . . . wanted to increase the number of craft

trainees." (21a). This pivotal appellate finding provided an important possible basis for Stipulation 29; if Gulf indeed needed another 203 craft workers, its decision to adopt Stipulation 29 would be far more plausible.

In fact, however, Gulf had never claimed, and the district court had never found, that in 1967 there was a shortage of craft workers. On the contrary the district court explained at length that Gulf's major labor problem in this era was a surplus of inefficiently used employees, and that other reforms between 1959 and 1967 had been adopted for the purpose and with the effect of reducing the number of refinery craftsmen.[24] Gulf's own witnesses

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[24] 141a-142a:

> "[M]anpower problems . . . led to inefficient use of personnel.... The Port Arthur Refinery was charged with an operating loss in 1958 of $18

uniformly insisted that the company had too many employees.[25]

> million.... Labor, particularly maintenance [i.e. craft] labor, was a significant component of the excess costs, and the method of making work assignments contributed significantly to the problem.... Gulf's management responded with cost-cutting measures, including work force reductions through attrition and layoff.... Refinery management also sought to increase the efficiency of the work force."

(Emphasis added).

[25] DX 85, pp. 114-117 ("In 1955 the company management felt its level of personnel staffing was excessive. This resulted in a moratorium on the hiring of new personnel. Concurrently, there was initiated a program of attrition through the encouragement of early retirement. In 1957 management cost analyses indicated that the refinery continued to be overmanned in virtually all phases of operations and maintenance. . . . A large percentage of this labor cost was being charged to maintenance labor. . . . Since 1962 . . . [t]he company has established a personnel policy of hiring one new employee for every two employees that leave the company.")

Review of this aspect of the case is warranted, not because the Fifth Circuit erred as a matter of fact, but because the appellate opinion simply flies in the face of this Court's decision in Swint,

> When an appellate court discerns that a district court has failed to make a [needed] finding ..., the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings: "[F]act finding is the basic responsibility of district courts rather than appellate courts..." Yet the Court of Appeals ... failed to remand for further proceedings.... Instead the Court of Appeals made its own determination.

456 U.S. at 291-92. In Swint itself the Fifth Circuit relied on its own findings of fact to overturn a district court decision; here the Fifth Circuit relied on its own factual findings to provide an alternative ground for affirming a district court decision. But under Swint that is a distinction without a difference. The purpose of Rule 52 is not to maximize the

odds that a district court decision will be upheld, but to assure that the primarily responsibility for resolving factual issues remains in the trial courts. Where, as here, a district court decision is tainted by error, the proper course under Swint is to direct the trial court to consider the matter anew, not for an appellate court to "assist" the district judge by making supplemental factual findings of its own.

IV. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S DECISION IN TEXAS DEPT. OF COMMUNITY AFFAIRS V. BURDINE, 450 U.S. 248 (1981)

The individual claims in this case present a recurring problem central to the meaning of Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). Three of the petitioners claimed and testified that they had been denied promotions to supervisory positions because of their race. Gulf initially chose to

stake its defense on its contention that these claimants had failed to establish a prima facie case of discrimination. The company never called a personnel or any other official to testify as to what non-discriminatory reason, on his or her view, was the actual consideration which led to denials of the disputed promotions.

The district court initially held that the three claimants had failed to establish a prima facie case. (247a, 250a, 251a). The Fifth Circuit reversed. (126a-129a). On remand the company made no effort to adduce additional evidence. Instead, Gulf submitted in, 1988, a legal memorandum which for the first time purported to offer the reasons why the petitioners had not been promoted.[26] Petitioners objected that

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[26] Defendant Gulf Oil Corporation's Proposed Findings of Fact and Conclusions of Law on Remand, pp 23-28.

under Burdine such a defense could only be offered by way of testimony from a knowledgeable witness. But the district court accepted as truthful and persuasive the reasons advanced in that memorandum by Gulf's attorneys; indeed all of the district court's 1988 "findings" regarding the individual claim were taken, verbatim, from Gulf's written submission.[27]

On appeal the central issue was whether, consistent with Burdine, an employer could rebut in this way a prima facie case of discrimination. The Fifth Circuit held that under Burdine it was permissible for an employer to adduce its purported legitimate reason in argument of counsel, so long as the argument of counsel was related to some facts in the record:

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[27] Compare id. at 23-28 with 174a-180a.

> Plaintiffs argue that Gulf's reason for not promoting [petitioners] was only asserted through arguments of counsel. The issue was not merely raised in the arguments of counsel, however, for there is ample evidence in the record to support the district court's finding.

(40a). On the Fifth Circuit's view an employer need not adduce direct testimony identifying, or even disclose at trial, the nature of the non-discriminatory reason on which it intends to rely to rebut a prima facie case. An employer can defer identifying its purported non-discriminatory reason until the filing of a brief long after trial, so long as the reason ultimately offered has some evidentiary foundation. Here the case was tried in April, 1984; the memorandum of respondents which first disclosed the reasons relied on by the company, and ultimately accepted by the courts below, was filed in 1988.

The decisions of the district court and Fifth Circuit are squarely inconsistent with Burdine. Where as plaintiff makes out a prima facie case of discrimination, Burdine provides that

> The defendant must set forth, through the introduction of admissible evidence, the reason for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant.
>
> An articulation [of the non-discriminatory reason] not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely ... by argument of counsel.

450 U.S. at 255 and n. 9 (Emphasis added). The Fifth Circuit held, to the contrary, that the "reason" or "explanation" need not be offered or admitted at trial, so long as there is evidence which supports a reason later adduced by argument of counsel.

Burdine insists on the introduction of evidence identifying the purported non-discriminatory reasons in order

> to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.[28]

450 U.S. at 255-56. But where, as here, the purported non-discriminatory reason is first identified years after trial, a plaintiff has no opportunity whatever to offer evidence that that reason is pretextual. In the instant case, for example, Gulf asserted in 1988, and the district court held, that petitioners Hayes and Brown had been denied promotions because "Gulf did not know they wished to be promoted" (178a), since neither had "express[ed] an interest in a supervisory job" (175a). Had this reason been offered at trial, petitioners might have demonstrated in a variety of ways that it was pretextual, such as by adducing evidence that Gulf had in fact promoted

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[28] 450 U.S. at 255-56.

whites despite the fact that they, like Hayes and Brown, had never expressed an interest in a supervisory job.

The decision of the Fifth Circuit is squarely inconsistent with the decision of the District of Columbia court of appeals in Lanphear v. Prokop, 703 F.2d 1311 (D.C. Cir. 1983). In Lanphear the district court upheld an explaniation which, although it had some factual foundation, had never been offered by defendants during trial as the actual reason for their conduct. The court of appeals, relying on Burdine, reversed:

> The purpose of [Burdine's] allocation [of burdens] is to focus on issues and provide plaintiff with "a full and fair opportunity" to attack the defendant's purported justification. That purpose is defeated if defendant is allowed to present a moving target or, as in this case, conceal the target altogether.

703 F.2d at 138. In the instant case that target -- the purported reasons for denying

the disputed promotions -- remained concealed until long after trial.

The decision of the Fifth Circuit expressly permits an employer to postpone revealing its purported justification until long after trial. Under such a procedure a Title VII plaintiff, as occurred here, would never have an opportunity to offer evidence attacking that explanation. In the absence of such proof of pretextuality, the mere post-trial assertion of a reason by defense counsel would automatically be conclusive of the litigation. That is not the order of proof contemplated by Burdine or McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

CONCLUSION

For the above reasons, a writ of certiorari should be granted to review the judgments and opinions of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

Supervisors Rating of Most Important Boilermaker "Duty" Elements

1. Using common hand-held non-power tools (e.g., hammer, wrench, screwdriver, etc.)

2. Follow established safety procedures.

3. Working at heights more than four feet off the ground.

4. Using common hand-held power tools (e.g. drills, wrenches, saws, etc.).

5. Working as a member of a team.

6. Carry out simple oral instructions.

7. Working outside.

8. Using handling and lifting devices (e.g. winches, gin-poles, A-frames, etc.).

10. Maintaining clean, orderly, safe work area.

Source: DX 162.

APPENDIX B

Supervisors Rating of Three Most Important "Duty" Elements, Port Arthur Craftsmen

Boilermaker

1. Using common hand-held non-power tools.
2. Following established safety procedures.
3. Working at heights more than four feet off the ground.

Pipefitter

1. Assembling or installing piping or piping systems.
2. Using common hand-held non-power tools.
3. Maintaining clean, orderly, safe work area.

Lab Analysis/Technician

1. Following routine laboratory procedures.
2. Obtaining samples, testing, and interpreting results.
3. Performing simple arithmetic calculations.

Instrument Mechanic

1.* Adjusting or calibrating machines.

1.* Performing routine maintenance of pneumatic, electrical, or other instruments.

3. Performing minor repairs on pneumatic, electrical or other instruments.

Welder

1. Operating welding equipment.

2. Working outside.

3. Following established safety procedures.

Carpenter

1. Using common hand-held non-power tools.

2. Working at heights more than four feet off the ground.

3. Carrying out simple oral instructions.

* Where two elements have the same ranking, they were regarded by supervisors as of equal importance.

Source: DX 162.

APPENDIX C

42 U.S.C. § 2000e-2 (a)(1) provides:

> It shall be an unlawful employment practice for an employer --
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e (h) provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority ... system.

89-1617

Supreme Court, U.S.
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No. 89-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WESLEY P. BERNARD, *et al.*,

Petitioners,

v.

GULF OIL CORPORATION, *et al.*,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Wesley P. BERNARD, Elton Hayes, Rodney Tizeno, Hence Brown, Doris Whitley and Willie Johnson, Plaintiffs-Appellants,

v.

GULF OIL CORP., *et al.*,
Defendants-Appellees.

No. 88-6141.

United States Court of Appeals,
Fifth Circuit

Dec. 18, 1989.

Before BROWN, REAVLEY, and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

The case history is long, from 1967, when the first complaint was lodged with the EEOC, to this appeal, the third before this court. In 1976, six present and retired black employees at the Gulf Oil Corporation's Port Arthur, Texas refinery filed this suit. The complaint alleged a variety of racially discriminatory practices in

violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. In 1977, the district court dismissed the Title VII claims on procedural grounds, and granted summary judgment on the § 1981 claims (*Bernard I*) This court reversed. 619 F.2d 459 (5th Cir. 1980) (en banc), *aff'd* 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981) (*Bernard II*) The case was tried in 1984. In 1986, the district court issued its opinion finding in favor of the defendants on all claims. 643 F.Supp. 1494 (E.D.Tex. 1986) (*Bernard III*). This court affirmed in part and vacated in part, remanding the case for further findings. 841 F.2d 547 (5th Cir.1988) (*Bernard IV*). On remand the district court again found for the defendants on all issues (*Bernard V*).

On January 24, 1983, the district court provisionally certified a class of all blacks who had worked or applied for work at the refinery in union covered jobs at any time

after December 26, 1966. Pursuant to the order of the district court, written notification of the class action and certification was mailed in September 1983 to the members of the class. In April 1984, the district court modified that certification order to exclude a substantial number of the original class members, and this court upheld that modification. *Bernard IV*, 841 F.2d at 550. On remand plaintiffs requested that the former class members be notified of that change. The defendants opposed the motion, and the district judge denied it.

The class appeals from the district court's ruling in favor of the defendants and from the denial of the motion to notify former class members. The class contends that the Gulf seniority system is not bona fide, that Stipulation 29 was intentionally discriminatory, and that the tests used by Gulf to determine who was eligible for promotion were discriminatory because they had an adverse impact on blacks and were not sufficiently job related. In addition,

three individual plaintiffs, Mr. Brown, Mr. Hayes and Mr. Tizeno, appeal from the district court's ruling that Gulf did not discriminate in not promoting them. We affirm because we are persuaded that the district court was not clearly erroneous in its determination that Stipulation 29 was not purposefully discriminatory and was justified by valid business reasons, the craft tests were sufficiently job related, and there was no discrimination in the failure to promote Mr. Brown, Mr. Hayes and Mr. Tizeno.

I. Factual Background

Gulf's Port Arthur refinery has had three basic work areas throughout its history: operations and maintenance ("Crafts"), which require skilled employees, and until 1954 were staffed exclusively by whites; and labor, which is composed of unskilled employees who assist the craft groups, and until 1956 was exclusively comprised of blacks.

In 1950 the labor department had many subdepartments, each assigned to work with a specific craft department. The twenty integrated craft departments effectively had two separate lines of progression, one for their white employees and the other for the black employees assigned to their departments. Although black laborers effectively worked in many of the same departments as white craft employees, they could not bid into the more desirable white lines of progression. Between 1954 and 1956, the craft and labor departments were assigned to one of two divisions. The craft departments were assigned to the Operating and Mechanical ("O & M") Division, and the labor department, with its various subdepartments, was assigned to the Labor Division. As of 1956, both black and white employees progressed up their separate promotional lines based on plant seniority and ability to perform. Newly hired blacks would be assigned to the Labor Division,

while newly hired whites would be assigned to one of the craft departments in the O & M Division.

The 1956 Contract between Gulf and the OCAW made the "Labor" classifications in the Labor Division the entry level position for all employees, both black and white. After progressing to the top position in one of the Labor lines of progression, an employee could transfer to an entry level position in one of the O & M lines of progression after bidding into the mechanical helper pool, which was a classification apparently created to provide apprentice-type instruction for employees entering an O & M line of progression. Bids for entry into the O & M lines of progression were selected on the basis of plant seniority. An employee who successfully bid into an O & M line of progression was assigned dual seniority, O & M Division seniority and plant seniority. White employees generally had more O & M seniority because of the earlier practice of hiring whites directly into the craft

positions. In 1963, divisional seniority was eliminated, and plant seniority became the basis for all promotions, demotions and lay offs. The effect of this change was that blacks with more plant seniority but less O & M seniority than whites in the same job classification could compete for promotions to the next highest classification based upon their longer plant seniority, thereby bypassing white employees with greater O & M seniority.

In 1967, Gulf management became convinced that its plant was inefficient. As part of a general restructuring, Gulf and OCAW made a special agreement, Stipulation 29, which reclassified workers in the maintenance departments.[1] As part of the restructuring the Labor Division was eliminated and its employees were assigned to the various crafts with which they had been working. The lines of progression were streamlined and

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[1][See next page for text of this footnote.]

Note 1:

BEFORE REORGANIZATION & STIPULATION 29		AFTER REORGANIZATION & STIPULATION 29
O & M DIVISION	LABOR DIVISION	MAINTENANCE DIVISION
Instrument Depart.	Labor Subdepart.	Instrument
Instrument Man No.1		Instrument Man
Mechanical Trainee		Mechanical Trainee
Instrument Man No.2 (Craft Helper)		Utility Man
Instrument Man No.3 (Craft Helper)		Laborer
Mechanical Helper Pool		
	Utility Man No.1	
	(Intermediate Job Classifications)	
Laborer		

the categories of "mechanical helper" and "craft helper" were eliminated. Those who were mechanical helpers were reclassified as "utility men" (a demotion), while Stipulation 29 reclassified the craft helpers as "craft trainees" (a promotion) if they passed a simple test. 203 of 204 who took the test passed and were promoted to mechanical trainee. 95.6% of those promoted were white. A large portion of the utility men and mechanical helpers were black.

Both before and after Stipulation 29 all others not transferred as a result of Stipulation 29 were required to pass a battery of written tests in order to become craft trainees. These tests had an adverse impact on blacks in that blacks had a significantly lower pass rate than whites. The "Old Tests" were administered prior to 1971, and the

"New Tests" after 1971.[2] Both sets of tests had an adverse impact on blacks.[3] No validation study was ever done on the old tests, but Gulf has attempted to show that the new tests are job related through a study to determine the correlation between test scores and job performance.

II. The Seniority System and Stipulation 29

The class first argues that the seniority system is not bona fide because it locks in the effects of pre-Act

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[2]The Old Tests consisted of six separate tests:

(A) Test of Reading Comprehension; (B) Test of Arithmetic Fundamentals; (C) Wonderlic Personnel Test; (D) Mechanical Aptitudes Test; (E) Mechanical Insight Test; (F) A Lee-Clark Arithmetic Test.

The New Tests consisted of four parts: (A) Dennett [sic] Mechanical Comprehension Test; (B) Test of Chemical Comprehension; (C) Arithmetic Test; (D) Test Learning Ability. After 1971, these tests were also used for the hiring of new employees. Thus, any employee hired after 1971 was not required to take any additional tests to enter a craft.

[3]82.5% of whites who took the old tests between January 1969 and March 1971 ultimately passed. Only 42.8% of blacks who took the same tests during that period passed. Between 1971 and 1980, 97.7% of the whites who took the new tests passed, while only 66% of the blacks passed.

discrimination. This issue was resolved by this court in *Bernard IV*, 841 F.2d 547 (5th Cir.1988), following *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.396 (1977). *Teamsters* held that where an employer had engaged in intentional discrimination in hiring or assignments, the employer could lawfully utilize a seniority system that perpetuated the effect of that earlier discrimination, but only if the seniority system itself was bona fide. 431 U.S. at 347-54, 97 S.Ct. at 1860-64. Under *Teamsters* a seniority system in not bona fide if it had "its genesis in racial discrimination" or was "negotiated and maintained" with an "illegal purpose." 431 U.S. at 356, 97 S.Ct. at 1865. The class attempts to distinguish *Teamsters*, arguing that, while pre-Act discrimination in hiring and assignment will not make a post-Act seniority system which is otherwise bona fide illegal, a pre-Act seniority system which discriminated will make an otherwise bona fide post-Act seniority system illegal. This

contention was rejected in our earlier opinion, where we expressly held:

> [W]e question whether a seniority system which is neutral as of the effective date of Title VII, which is based on plant seniority, and which has a single bargaining unit could ever be held unlawful solely because of pre-Act discrimination. That the 1963 changes did not rectify the effects of past discrimination, and in fact operated in some ways to lock those effects in, does not imply, in the absence of purposeful discrimination in connection with the post-Act system, that this system was not bona fide under 703(h). See *Teamsters, 481 U.S. at 353, 97 S.Ct. at 1863* (seniority system does not become illegal "simply because it allows the full exercise of the pre-Act seniority rights of employees of a company that discriminates before Title VII was enacted").

841 F.2d at 556. We remanded to the district court to determine whether Stipulation 29 evidenced purposeful discrimination, "the establishment of which is essential to plaintiffs' claim that the seniority system was not bona fide under 703(h)." 841 F.2d at 560

The class really makes two arguments with respect to Stipulation 29: first, that through its operation it served to make the seniority system non-bona fide; and second, that in and of itself it was a discriminatory act by the employer in violation of Title VII because of its disparate impact on blacks.

The district court found that Stipulation 29 was not purposefully discriminatory and was justified by valid business reasons. The class contests these findings. The standard of review for such a decision is whether, looking at the record as a whole, the district court was clearly erroneous in its determination that there was no purposeful discrimination and that the action resulting in disparate impact was justified by legitimate business reasons. Fed.R.Civ.P.52(a). *See Anderson v. Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1567, 23 L.Ed.2d 129 (1969);

Moorhead v. Mitsubishi Aircraft International, 828 F.2d 278, 282 (5th Cir. 1987). We find that the district court was not clearly erroneous.

Before Stipulation 29, black utility men could become mechanical helpers and craft helpers, joining whites with less seniority who had started in higher positions than blacks because of the earlier discrimination. When positions opened for craft trainees, those blacks could bypass the whites with more craft seniority if the blacks had longer plant seniority. Stipulation 29 worked to lock blacks into the lower positions by promoting the craft helpers, who at that time were mostly white and often had less plant seniority than blacks, into the trainee positions. Blacks were precluded from opportunities they would have had earlier if it weren't for Stipulation 29. In *Bernard IV*, this court found that senior blacks were denied the opportunity to by-pass junior whites, and the class had, therefore, established a prima facie case of

adverse impact. 841 F.2d at 560, citing *Connecticut v. Teal*, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982).

Section 703(a), 42 U.S.C. § 2000e-2(a), proscribes discriminatory employment practices, including discrimination "with respect to . . . compensation, terms, conditions, or privileges of employment" on the basis of race, but section 703(h) insulates bona fide seniority systems from these dictates, providing that

> [n]otwithstanding any other provision . . ., it shall not be an unlawful employment practice for an employer to apply different standards of compensation or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race . . . .

42 U.S.C. § 2000e-2(h).

Whether a seniority system, neutral on its face, is bona fide depends upon "whether there has been purposeful discrimination in connection with the

establishment or continuation of [the] seniority system." *Bernard IV*, 841 F.2d at 555, citing *James v. Stockham Valves & Fitting Co.*, 559 F.2d 310, 351 (5th Cir. 1977), cert. denied, 434 U.S. 1034,98 S.Ct. 767, 54 L.Ed.2d 781 (1978). The Supreme Court in *Teamsters* set out four factors relevant to making this determination, which this court adopted in James:

> (1) whether the seniority system operates to discourage all employees equally from transferring between seniority units;
>
> (2) whether the seniority units are in the same or separate bargaining units and, if separate, whether that structure is rational and industry-wide;
>
> (3) whether the seniority system had its genesis in racial discrimination; and
>
> (4) whether the seniority system was negotiated and maintained free from any illegal purpose.

Id. at 352.

This court found the first three of the factors in favor of defendants, but remanded to the district court to

consider whether Stipulation 29 showed that the system had been maintained with a discriminatory purpose. *Bernard IV*, 841 F.2d at 560. The district court found that Stipulation 29 was adopted in an effort to improve efficiency at the refinery, was undertaken for an economic purpose, was undertaken for legitimate business reasons and did not reflect purposeful racial discrimination.

The class points to evidence that Stipulation 29 was racially motivated, but there was also evidence of legitimate reasons for the reorganization of employees. In addition, Gulf had various programs to increase mobility for blacks in its plant. It had an affirmative action program and several training programs to try to insure that blacks would be able to rise within the company. The record supports the district court's determination, and it is not clearly erroneous that Stipulation 29 was not adopted for purposefully discriminatory reasons.

Under a disparate impact theory as set out in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), and clarified in *Watson v. Fort Worth Bank & Trust*, ___ U.S. ___, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988) and *Ward's Cove Packing Co., Inc. v. Atonio*, _ U.S. ___, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989), the district court also was not clearly erroneous in finding that although Stipulation 29 may have had an adverse impact on blacks it was justified by legitimate business purposes.

Under *Ward's Cove*, if a plaintiff makes out a *prima facie* case by showing that a specific practice has a disparate impact on a protected class, then the burden shifts to the employer to produce evidence, but not to prove, that the "challenged practice serves, in a significant way, the legitimate employment goals of the employer." 109 S.Ct. at 2126. The Supreme Court noted that while "a mere insubstantial justification in this regard will not

suffice, . . . there is no requirement that the challenged practice be 'essential' . . . for it to pass muster." *Id.* Moreover, although the employer carries the burden of producing evidence of a business justification for his employment practice, the burden of persuasion remains with the disparate-impact plaintiff to prove that the challenged practice does not significantly serve legitimate employment goals. *Id.*; *Watson*, *supra* _U.S. at ___, 108 S.Ct. at 2790.

The district court relied in part on the testimony of Dr. Milden J. Fox, an expert in Industrial Relations, who studied four refineries as part of his dissertation, which was entered into evidence. Dr. Fox testified at trial that Stipulation 29 was part of an ongoing effort to improve efficiency at the Refinery. He testified that before Stipulation 29 the method of work assignments contributed to excess maintenance costs, and that management sought to increase efficiency through measures permitting more

flexible use of employees, including Stipulation 29. Stipulation 29 was designed to take employees out of specific craft job classifications, and move them into the trainee positions, making them "universal mechanics," i.e., people who could perform any job associated with a particular craft. Dr. Fox testified that various measures, including Stipulation 29, conformed with industry practices at the time. The testimony of Mr. Charles Draper, who spent 30 years in the Refinery's personnel department, was consistent with Dr. Fox's testimony. The district court found that the craft helpers reclassified under Stipulation 29 had at least ten years' experience in their craft, and as craft helpers they performed a significant amount of the work of the No. 1 (journeyman) craftsmen, so it would take minimal additional training to qualify them as journeyman craftsmen. The district court found that mechanical helpers and laborers did not have comparable experience, so they would require much more training to

do the work of journeyman craftsmen efficiently and safely. This is supported by the record, which shows that the mechanical helpers and laborers were shuttled from craft to craft to do whichever labor was necessary to help those in the crafts, but did not receive training at any one specific craft.

Plaintiffs contend that the district court misunderstood the import of Stipulation 29, that it was not a measure designed to change lines of progression, but simply the promotion of 203 mostly white craft helpers. Plaintiffs go too far in simplifying Stipulation 29: it cannot be observed in isolation, but must be considered in the context of Gulf's reorganization. The district court found that Gulf wanted to simplify the lines of progression through reorganizing, and wanted to increase the number of craft trainees, leading to an increase in the number of persons who were trained to handle all aspects of a craft. In order to do that Gulf had several options. One option

was Stipulation 29, which moved workers into trainee positions from the next lowest position. Another option (suggested by the class) would have been to demote all the craft helpers to utility men, then draw craft trainees from the pool of utility men that included senior blacks who had been utility men and junior whites who had been craft helpers. The district court found that Gulf had a legitimate reason for choosing the Stipulation 29 option--it wanted to reclassify as trainees those workers with the most *craft* experience so they would need less training. The district court specifically found that the craft helpers all had at least 10 years of craft experience. The utility men who would have been in the pool under the second option would not have had such experience in *craft* work, even if they would have had greater *plant* seniority. The class has not shown that the proposed alternative would be equally as effective as Stipulation 29 in meeting Gulf's objectives. *See Ward's Cove Packing Co., Inc. v. Atonio*,

_ U.S. __, 109 S.Ct. 2115, 2126, 104 L.Ed.2d 733 (1989). Thus, the district court was not clearly erroneous in finding that Gulf had legitimate business reasons for Stipulation 29, and that it was not discriminatory.

III. The Craft Tests

The class claims that the tests used to determine which employees were eligible for promotion to journeyman craftsmen were discriminatory. It claims that the tests had an adverse impact on blacks because the pass rate for blacks was significantly lower than the pass rate for whites, and that Gulf has failed to show that the tests were sufficiently job related.

In *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), the Supreme Court held that Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." *Id.*

at 432, 91 S.Ct. at 854. Once the plaintiffs have made out a prima facie case of disparate impact, the employer must then show that its tests are "job related." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975). If the employer shows that the tests are job related, "it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" *Albermarle*, 422 U.S. at 425, 95 S.Ct. at 2375, *quoting McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801, 93 S.Ct. 1817, 1823-24, 36 L.Ed.2d 668 (1973). Although an employer has the burden of showing job relatedness, this does not mean that the ultimate burden of proof can be shifted to the defendant. "On the contrary, the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains

with the plaintiff at all times." *Watson v. Fort Worth Bank & Trust*, ____ U.S. ___, ___, 108 S. Ct. 2777, 2790, 101 L.Ed.2d 827 (1988).

Both the pre-1971 "Old Tests" and the post-1971 "New Tests" had an adverse impact on blacks. On remand the district court was to determine whether "professionally accepted methods" showed that the tests were "significantly correlated" to job performance in each of the relevant crafts. *Bernard IV*, 841 F.2d at 566-67. The district court was to explain specifically what it relied on in determining significant correlation. *Id.*

The issue before us is whether Gulf's validation methods were properly accepted by the district court. Gulf had a validation study done which compared New Test scores with performance in five crafts. Three of the studies were inconclusive regarding correlation between test scores and performance, while two studies yielded correlation coefficients (measurements of the frequency

with which higher test scores correlated with better job performance) for the pipefitter and boilermaker crafts.[4] The study then computed adjustments for various factors, resulting in seven different adjusted correlation coefficients for each craft. The class contends that the district court should have specifically stated which correlation coefficient it found a statistically significant indication of job-relatedness, and why a particular adjustment was chosen. Plaintiffs urge that a correlation coefficient in the .30-.40 range be established as the minimum for proof of a job

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[4]Test scores were compared to job performance for a number of job classifications. The study developed by Richardson, Bellows and Henry ("RBH") attempted to establish the validity of the new tests for five of the OCAW crafts: boilermaking, pipefittings, welding carpenter, and instrument. However, RBH was unable to validate the tests for the latter three crafts. The job performance ratings for the welders were too similar to establish a significant correlation between test and job performance. In the case of carpenters and instrument mechanics, the ratings given by the two raters used to evaluate job performance (each employee was evaluated by two supervisors and their ratings were compared to derive a single job performance rating) differed to such a degree that RBH concluded that neither rating was a reliable measure of the employees' job performance. Therefore, the 1985 study introduced into evidence contained data about only two of the craft departments, boilermaking and pipefitting.

related test. We decline to establish a bright line cut-off point for the establishment of job-relatedness in testing.

In *Watson v. Fort Worth Bank & Trust*, the Supreme Court stated:

> [E]mployers are not required, even when defending standardized or objective tests, to introduce formal 'validation studies' showing that particular criteria predict actual on-the-job performance.

__U.S. ___, ___, 108 S.Ct. 2777, 2790, 101 L.Ed.2d 827 (1988). Justice Blackmun, while dissenting in part from the plurality opinion, agreed on this point, recognizing that "job-relatedness cannot always be established with mathematical certainty" and that a variety of methods are available for establishing the link between selection processes and job performance, including the results of studies, the presentation of expert testimony, or prior successful experience. *Id.*, __ U.S. at ___, 108 S.Ct. at 2796. Therefore, plaintiff's urging a minimum correlation

coefficient goes beyond what is required by Supreme Court precedent.

This court held in its earlier opinion that:

> To establish the job relatedness of the tests, the degree of correlation between test scores and job performance ratings must be examined. The district court upheld the validity of the tests without making any findings concerning the sufficiency of correlation. Because a finding of significant correlation between test results and job performance is a prerequisite to a holding that the tests are job related, we assume that the court *sub silento* [sic] made this finding.

841 F.2d at 566. This court found no way to determine the basis for the district court's holding, however, so remanded for further findings. *Id.* at 567. Although appellants claim the district court did not make the requisite findings upon remand, the district court did find the following:

> 1. The study showed that performance on the New Tests correlated .32 with job performance as a Boilermaker, and .22 with performance as

Pipefitter, and that these correlations are both statistically significant.

2. Although the unadjusted correlations are statistically significant, the adjusted figures, which are even higher than unadjusted, are better estimates of validity, and even they underestimate the true validity of the New Tests.

3. The testimony of Gulf's expert witnesses was convincing, and they adequately explained, based upon research and their past experience, why the tests were job related, why the correlation coefficients resulting from the study needed to be adjusted for various factors, and why these adjusted figures were more accurate.

The district court was not clearly erroneous in its findings, which are supported by the expert testimony in the record. "The question of job relatedness must be viewed in the context of the plant's operation and the history of the testing program." *Albemarle*, 422 U.S. at 430, 95 S.Ct. at 2377-78. In *Albermarle*, the test were not found to be job related because "no attempt was made to analyze jobs in terms of the particular skills they might require." *Id.*

Here the jobs were all analyzed in terms of particular skills, and the test studies were conducted accordingly.

In its prior opinion, this court invited the district court to consider whether the similarity between pairs of jobs could be used to generalize the validity of the new tests from boilermakers and pipefitters to craft jobs involving similar abilities. *Bernard IV*, 841 F.2d at 567 n. 54. This sort of analysis can be used to extrapolate the validity of the tests from the crafts for which a study was done, to the crafts where no study was done, or where the sample size was too small to get accurate results. The rationale for this approach was accepted in *Aguilera v. Cook County Police & Corrections Merit Bd.*, 582 F. Supp. 1053, 1057 (N.D. Ill.1984) (comparing required skills for correctional officer with required skills for police officer), *aff'd* 760 F.2d 844, 847-48 (7th Cir. 1985), cited with approval in *Davis v. City of Dallas*, 777 F.2d 206, 212-13,

n. 6 (5th Cir.1985), *cert. denied*, 476 U.S. 1116, 106 S.Ct. 1972, 90 L.Ed.2d 656 (1986).

Having found that Gulf had shown the new tests were significantly correlated with performance as a boilermaker and pipefitter, the district court considered and compared the most important abilities in those two crafts with the important abilities in all the other crafts. If the most important abilities required the other crafts are closely related to the most important abilities of the boilermaker or pipefitter, it may be concluded that the new tests, which predict significant aspects of job performance for the boilermaker or pipefitter, also predict important abilities related to the performance of all other craft jobs as well. The district court found that the most important abilities for boilermakers or pipefitters were closely related to the important abilities for all of the other crafts, and extrapolated from that to find that the tests were job related for all of the crafts.

The district court accepted similar methods in *Cormier v. P.P.G. Industries*, Inc., where "cluster analysis" (looking for similar job traits, as was done here) was approved as a way to find correlations between test scores and performance. 519 F. Supp. 211, 259 (W.D.La.1981), *aff'd* 702 F.2d 567 (5th Cir. 1983). The district court's use of this method was reasonable, and its determination that there was sufficient similarity in the skills required for the various crafts to find the tests were job related for all crafts is not clearly erroneous. The district court accepted the same sort of "path analysis," in determining that the "Old Tests" measured skills similar to those measured by the "New Tests." Therefore, its finding that the "Old Tests" were sufficiently job related to justify their use, despite disparate impact on blacks, was not clearly erroneous.

Finally, the class seeks to refute Gulf's showing that the test were job related by showing an alternate method

was available that would have had less adverse impact yet met the same business purposes as the Old and New Tests. *See Albermarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). Plaintiffs suggest the simple test used in conjunction with Stipulation 29.

The district court rejected this alternative, making no findings as to its adverse impact, and finding it unlikely to suit Gulf's business purposes as well as the tests actually used. The simple test was used once, as part of a reorganization. The only people taking the test already had ten years craft experience. Its purpose was to screen out total incompetence, not determine who would do best at a job. In order to require an alternative with less disparate impact, the disparate-impact plaintiff must prove that the proposed alternative is "equally effective" as the employer's procedure. *Ward's Cove Packing Co., Inc. v. Atonio*, __ U.S. __, 109 S.Ct. 2115, 2127, 104 L.Ed.2d 733 (1989). The Supreme Court has made it clear that by

"equally effective" it meant an alternative practice that would serve the employer's business purpose fully as well in terms of utility, cost, "or other burdens" of the proposed alternative device. *Id.* The burden of proving that Gulf's business reasons were not sufficient, and that an alternative method of choosing craft trainees would be equally as effective as the tests used by Gulf, remained with the class at all times. *Id.*, 109 S.Ct. at 2126. Therefore, the district court's finding that the simple tests was not a viable alternative for the other Tests is not clearly erroneous.

The Supreme Court has cautioned that the "judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternate selection or hiring practice in response to a Title VII suit." *Id.* at 2127. In the face of statistically significant correlations, professional test construction, commonality of abilities associated with the various jobs at issue, the "path

analysis" correlations of the Old and New Tests, and the supporting expert opinion based upon massive validation studies of similar tests in the industry, this court will refrain from making business decisions for an employer when it is not clearly erroneous that its promotion practice is validly job related. "[I]t must be borne in mind that '[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." *Watson*, _ U.S. at ____, 108 S.Ct at 2791, quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 438 U.S. 567, 578,98 S.Ct. 2943, 2950, 57 L.Ed.2d 957 (1978).

IV. The Individual Claims

Three individual plaintiffs claim that Gulf discriminated against them in making promotions. Mr. Hayes, Mr. Brown and Mr. Tizeno all claim that they were qualified to become supervisors, but were not promoted, while whites were.

A. *Hayes and Brown*

The district court made specific findings of fact that Mr. Hayes and Mr. Brown, while complaining that they had not been promoted to permanent supervisory jobs, had testified that they had not made known to anyone in authority their interest in becoming supervisors. The district court further found that employees generally knew when they were eligible and that they were invited to inform supervisors of their interest in promotion. The district court also found several reasons why some employees would not want to be supervisors, and why it could not be assumed that all employees should automatically have been considered.

Under *Texas Dep't of Community Affairs v. Burdine*, in a failure-to-promote case the plaintiff must prove that he "*applied* for an available position for which [he] was qualified, but was rejected under circumstance which give rise to an inference of unlawful discrimination." 450 U.S.

248, 253, 101. S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981), (emphasis added). Under *McDonnell-Douglas Corp. v. Green*, such a plaintiff establishes a *prima facie* case by showing by a preponderance of the evidence that (a) he belongs to a group protected by Title VII; (b) he was qualified for the job; (c) he was not promoted; and (d) the employer promoted one not in the plaintiff's protected class. 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973).

The district court found that Hayes and Brown had not established a *prima facie* case because their failure to express interest made it impossible to tell which promotion they did not get and thus whether a white or a black was selected in preference to them. Blacks as well as whites were made supervisors during the relevant period in numbers proportional to those in the eligible pool.

Even assuming *arguendo* that Hayes & Brown had established a *prima facie* case, the district court found that Gulf had a sufficient business reason to rebut the inference of discrimination.

> If plaintiff makes out a *prima facie* case, the employer must produce "evidence that the plaintiff was rejected, or someone else was preferred, for legitimate, non-discriminatory reasons . . . ." [Burdine 450 U.S.] at 253-254 [501 S.Ct. at 1094]. If the employer meets this burden, "the presumption of discrimination 'drops from the case' and the District Court is in a position to decide whether the particular employment decision at issue was made on the basis of race."

McDonnell-Douglas, 411 U.S. at 802, 93 S.Ct. at 1824, *quoting Cooper v. Federal Bank*, 467 U.S. 867, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984). In meeting its burden of production, Gulf did not have to prove what its reasons were; it simply had to produce evidence that "raise[d] a genuine issue of fact as to whether it discriminated" against Hayes and Brown. *Burdine*, 450 U.S. at 254-255,

101 S.Ct. at 1094-95. Once Gulf produced evidence that raised a genuine issue of fact as to its reasons for denying Hayes and Brown promotions, it was up to Hayes and Brown to show by a preponderance of the evidence, that discrimination is the likeliest explanation for the fact that they were not promoted to supervisory positions.

The district court held that the reason Hayes and Brown were not promoted was their failure to inform the company that they wished to be promoted. Plaintiffs argue that this is a clearly erroneous finding because it is supported by insufficient evidence. Plaintiffs maintain that Gulf should have shown that only those who requested promotion were promoted. Plaintiffs mistake the allocation of burdens here. Once Gulf produced evident to show what its business reasons were for not promoting Mr. Hayes or Mr. Brown, it was up to the plaintiffs to produce evidence to show that the reason given was a sham. *Burdine*, 450 U.S. at 253, 255 n. 10, 101 S.Ct. at

1095 n. 10. Plaintiffs argue that Gulf's reason for not promoting Mr. Hayes or Mr. Brown was only asserted through arguments of counsel. The issue was not merely raised in the arguments of counsel, however, for there is ample evidence in the record to support the district court's finding:

> 1. Mr. Hayes and Mr. Brown each testified that they had told no one in authority of their interest in becoming supervisors;
>
> 2. Mr. Draper testified that employees were invited to inform supervisors of their interest in promotion;
>
> 3. There was no evidence that all employees wanted to become supervisors; and
>
> 4. Mr. Brown's testimony indicated he knew how to express interest, but he chose to remain silent.

The district court's finding that Mr. Hayes and Mr. Brown were not promoted for non-discriminatory reasons is not clearly erroneous.

B. *Tizeno*

Mr. Tizeno did apply twice for a supervisory position (once for a position as "planner" and once for a position as "supervisor"). On remand the district court found that Mr. Tizeno had established a *prima facie* case, "although a weak one." The district court found that the record as a whole did not support an inference that racial discrimination was likelier than not the reason that Tizeno was not promoted. Specifically, the district court found that:

> (1) Although Mr. Chesser, a white who was promoted to planner, had less seniority than Mr. Tizeno, Mr. Chesser also had less seniority than most other pipefitters, including 108 who were white, 80 of whom had greater seniority than Mr. Tizeno as well.
>
> (2) There was no evidence that Mr. Tizeno was otherwise more qualified than Mr. Chesser.
>
> (3) Several person, including 4 blacks were appointed to supervisory positions in 1979, making it hard to tell which position Mr. Tizeno did not get. At that time Mr. Tizeno was one of the most junior pipefitters.

The district court was not clearly erroneous in its determination that the reason Mr. Tizeno was not promoted was not discriminatory.

V. Notification of Exclusion from the Redefined Class

Rule 23 of the Federal Rules of Civil Procedure requires a district court to give notice to absent class members of developments in the suit in only two situations:

> The first is when the court certifies a class under Rule 23(b)(3) because of common questions of law or fact that predominate over other aspects of the suit and render a class action the appropriate vehicle to resolve claims. (citation omitted). The second is when a class action is to be dismissed or compromised. Fed. R.Civ.P. 23(e).

Payne v. Travenol Laboratories, Inc., 673 F.2d 798, 812 *cert. denied*, 459 U.S. 1038, 103 S.Ct. 451, 74 L.Ed.2d 605 (1982).

Since this case involves the district court's modification of the class definition to exclude certain class members, it does not fall within either of the foregoing categories. Therefore, notification to those excluded members was not mandated, but instead was left within the discretion of the district court. *Id.* at 812. Although discretionary notification is encouraged in those instances where a plaintiff has shown that the excluded members: (1) received notice of their initial inclusion in the class; (2) relied on the class suit to protect their interests; and (3) would be prejudiced as a practical matter by their exclusion, *Id.* at 813, no such showing has been made by the class herein. Therefore, we find that the district court did not abuse its discretion in failing to give the excluded class members notice of the redefinition of the class.

VI. Conclusion

After reviewing the massive amounts of evidence in the record we find that the district court was not clearly

erroneous in ruling that Stipulation 29 was not purposefully discriminatory, and that even if it had an adverse impact it was justified by legitimate business purposes. Nor was the district court erroneous in finding that the test Gulf used to determine which employees were eligible for promotion were job related, based upon the validation studies and expert testimony. The record supports the district court's determination that Mr. Brown and Mr. Hayes did not show a *prima facie* case of discrimination in Gulf's failure to promote them, and that even if they made out a *prima facie* case, Gulf had shown legitimate reasons for not promoting them. Likewise, the district court was not clearly erroneous in holding that Mr. Tizeno had not proved that Gulf's failure to promote him was discriminatory. Accordingly, we AFFIRM.

Wesley P. BERNARD, *et al.*,
Plaintiffs-Appellants,

v.

GULF OIL CORPORATION, *et al.*,
Defendants-Appellees

No. 87-2033

United States Court of Appeals,
Fifth Circuit

March 22, 1988
Rehearing Denied April 18, 1988.

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Before SNEED*, REAVLEY and JOHNSON, Circuit Judges.

REAVLEY, Circuit Judge:

This is a class action suit brought by six present or retired black employees of Gulf's Port Arthur, Texas Refinery, all of whom are or were members of the Oil,

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*Circuit Judge of the Ninth Circuit, sitting by designation.

Chemical and Atomic Workers' International Union Local 4-23 ("OCAW"), against Gulf and the OCAW for declaratory, injunctive, and monetary relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. The suit was filed on May 18, 1976, within 90 days of plaintiffs Bernard, Brown and Johnson's receipt of right-to-sue letters from the Equal Employment Opportunity Commission (EEOC). Plaintiffs amended their complaint to join as defendants other unions which represent employees at the refinery, including: the International Association of Machinists and Aerospace Workers, Port Arthur Lodge No. 823; the International Brotherhood of Electrical Workers and its Local 390; the United Transportation Union and its Local 1071; and the International Union of Bricklayers and Allied Craftsmen and its Local 13 (collectively referred to as the "Trade Unions").

In April 1976, Gulf and the EEOC entered into a conciliation agreement in which Gulf agreed to cease various allegedly discriminatory practices, to establish an affirmative action program with respect to hiring and promotion, and to offer backpay to alleged victims of discrimination based on a set formula. Gulf sent notices to the 632 employees eligible for backpay asking in return for the execution of signed statements releasing Gulf from any possible claims of employment discrimination occurring before the date of the release, including any future effects of past discrimination.

This suit was filed one month later seeking to vindicate the rights of many of the employees who were receiving settlement offers from Gulf under the conciliation agreement. The district court entered an order limiting communication by the named parties and their counsel with prospective class members. This court, sitting en banc, held that the order was an unconstitu-

tional prior restraint on expression accorded First Amendment protection. *Bernard v. Gulf Oil Co.*, 619 F.2d 459 (5th Cir. 1980) (en banc), *aff'd on other grounds*, 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981). On writ of certiorari, the Supreme Court, while not reaching the First Amendment issue, held that the district court's order was an abuse of discretion under Fed. R. Civ. P. 23(d). *Gulf Oil v. Bernard*, 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981). The case was remanded to the district court for further proceedings.

On January 24, 1983, the district court tentatively and provisionally certified the class as all blacks who worked or applied for work at the refinery in union covered jobs at any time after December 26, 1966. On April 2, 1984 the court modified the class to exclude unsuccessful job applicants, employees not represented by the OCAW, and employees who signed releases in exchange for backpay under the conciliation agreement

between Gulf and the EEOC. The court also limited the relevant time period to employment practices occurring between December 26, 1966, which is 180 days prior to the date on which plaintiffs Bernard, Brown and Johnson filed their charges of discrimination with the EEOC, and May 18, 1976, the date upon which the complaint was filed. The court dismissed the Trade Unions because neither the named plaintiffs nor the modified class contained members of these unions.

At trial, plaintiffs advanced a number of classwide claims as well as individual claims on behalf of the named plaintiffs. Plaintiffs contended that: Gulf's seniority system was non-bona fide; a reclassification of employees pursuant to a stipulation ("Stipulation 29") between Gulf and the OCAW had an unlawfully discriminatory impact on blacks; certain tests administered by Gulf had an unlawfully discriminatory impact on blacks; Gulf intentionally applied its Sickness and Accident (S & A) policy

to blacks in a discriminatory fashion; Gulf intentionally discriminated against blacks in its selection of temporary and permanent supervisors; Gulf intentionally discriminated against the named plaintiffs; and the OCAW breached its duty of fair representation. Following a bench trial, the court held for Gulf and the OCAW on all of the classwide and individual claims, 643 F. Supp. 1494.

On appeal, plaintiffs assert that the district court incorrectly disposed of each of the classwide and individual claims, but concede that the only issues upon which the OCAW could be liable are those relating to the seniority system and Stipulation 29. In addition, plaintiffs contend that the district court improperly: decertified the class to exclude employees who had signed releases; dismissed the Trade Unions; and refused to consider certain union and company records.

We hold that the district court failed to address essential issues of the classwide claims concerning the

seniority system, Stipulation 29 and the craft tests as well as certain individual claims of intentional discrimination. We therefore vacate the court's judgment and remand for further findings. We find no error in the other rulings, which we now address.

I. *Partial Decertification of the Class, Dismissal of the Trade Unions, and Exclusion of Business Records*

Plaintiffs challenge the district court's partial decertification order to the extent that it excluded from the class employees who signed releases in exchange for backpay under the conciliation agreement between Gulf and the EEOC and dismissed the Trade Unions. The basis for the court's decision was its view that the named plaintiffs lacked standing both to represent employees who signed the releases and to pursue claims against the Trade Unions.

In reaching its decision, the court noted that class representatives must "possess the same interest and suffer

the same injury" as the class members, *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S 208, 216, 94 S.Ct. 2925, 2930, 41 L.Ed.2d 706 (1974), and that a plaintiff lacks standing to litigate injurious conduct to which he was not subjected. *Blum v. Yaretsky*, 457 U.S. 991, 999, 102 S.Ct. 2777, 2783, 73 L.Ed.2d 534 (1982). *See Vuyanich v. Republic Nat'l Bank of Dallas*, 723 F.2d 1195, 1200 (5th Cir.), *cert. denied*, 469 U.S. 1073, 105 S.Ct. 567, 83 L.Ed.2d 507 (1984). Because none of the named plaintiffs signed the releases or were members of the Trade Unions, the court found that they lacked standing to assert class claims on behalf of these employees. Accordingly, the court limited the class to OCAW members who had not signed releases, and dismissed the Trade Unions.

Plaintiffs do not challenge the court's exclusion of non-OCAW employees, but instead challenge the dismissal of the Trade Unions on the ground that these unions

discriminatorily prevented black OCAW members from transferring into jobs covered by these unions. The district court found that plaintiffs did not allege that the Trade Unions acted unlawfully against them. After reviewing the complaint and amended complaints filed by plaintiffs,[1] we find support for the district court's conclusion and hold that the Trade Unions were properly dismissed.

Plaintiffs attack the validity of the releases on the ground that they were obtained from employees during the period when the district court's order prevented counsel for the class from communicating with prospective class members. The validity of the releases, however, is not at issue. Their validity can be attacked in a separate

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[1]Plaintiffs third amended complaint only alleges that the OCAW and the Trade Unions "agreed to, acquiesced in, or otherwise condoned the unlawful employment practices [of Gulf, as described in the complaint]." It does not allege that the Trade Unions independently discriminated against OCAW members.

suit by employees who signed releases during the period when the court's order was in force.[2] The question presented to the district court was whether the named plaintiffs had standing to represent employees who had signed releases. Because the named plaintiffs sought to obtain relief already obtained by employees who accepted backpay and signed releases, the court found that the plaintiffs lacked standing to represent these employees.[3] We find no error in the court's determination.

Plaintiffs complain of the trial court's refusal to consider documents, described as business records, which plaintiffs say were given to the clerk during the trial. We

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[2] Only 33 of the 632 releases were signed during this period.

[3] The releases applied only to Gulf, not the OCAW. Plaintiffs contend that even if they had no standing, with respect to Gulf, to represent OCAW employees who had singed the releases, they did have standing to represent these employees with respect to the OCAW. We agree with the court's finding that this argument is without merit because the OCAW's liability is dependent upon a finding of liability against *Gulf*. *See supra* note 1.

find the documents in the record, but they bear no file stamp, and the transcript contains no reference to them. The parties did not agree to their submission. Exhibits come into evidence either by the agreement of the parties or by offer, the laying of a predicate subject to counter by the opposing party, and a ruling admitting the evidence by the trial court. The court correctly disregarded documents that were merely handed to the clerk.

II. *Gulf's Seniority System Under § 703(h)*

Plaintiffs contend that Gulf's pre-Title VII Act seniority system had a discriminatory impact on certain black employees after the effective date of Title VII and that the defendants failed to prove that the seniority system was bona fide under § 703(h). An examination of Gulf's seniority system is necessary to resolve this claim and plaintiffs' next claim concerning Stipulation 29.

A. Background

The Port Arthur refinery was established in 1903 and its labor force was not organized until 1943. Three basic work related areas have existed at the refinery throughout its history: operations, maintenance and labor. The operations group manufactures and processes oil based products and the maintenance group provides repair and construction services. Both groups require skilled employees and until 1954 only whites were hired into them. The district court broadly used the term "craft" to denote the operations and maintenance groups, their employees, lines of progression and the departments and divisions associated with operations and maintenance. We adopt this usage generally, but use the more specific labels where appropriate. The labor group is composed of unskilled employees who assist the craft groups and until 1956 was exclusively comprised of blacks.

In 1943 the refinery was organized by the Oil Workers International Union ("OWIU"), the predecessor to the OCAW. At this time, many departments existed and each was functionally related to operations or maintenance. A loosely constructed labor department also existed whose employees were assigned to these various craft departments. Each of these departments had a line of progression for its white employees which indicated the promotional scheme from the entry level position to the top position. It does not appear that clearly defined lines of progression had been established for black laborers.

The articles of agreement between the OWIU and Gulf incorporated the existing lines of progression. A seniority system was established based upon plant seniority, defined by the length of service at the refinery, and promotions and demotions alone the lines of progression were determined by seniority and ability to perform. A six month residency in one's particular job

classification was a prerequisite to advancement to the next highest job classification in a particular line of progression. Two union locals were established, Local 23 which represented white employees and Local 254 which represented black employees. Members of both locals comprised the union negotiating team.

In 1950 the refinery had thirty-four[4] departments: thirty-three craft departments[5] and one labor department. The labor department was composed of many subdepartments, and employees in these subdepartments were assigned to work in twenty of the thirty-three craft departments. Lines of progression had been established in the labor subdepartments, and these lines generally varied according to the structure of the craft departments

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[4]Excluding the main office department.

[5]At least four of these departments were non-OCAW crafts; bricklaying, electric shop, machine shop and transportation.

to which they were assigned.[6] This meant that the twenty integrated craft departments functionally had two separate lines of progression, one for their white employees and the other for the black employees assigned to their departments from the labor subdepartments. These integrated departments also had distinct seniority rosters reflecting

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[6]The 1954 lines of progression show how this system operated. At that time, the labor department was broken into ten subdepartments, including: Acid Plant, Alchlor, Car Shop & Hoist, Garage and Waste Oil, Lubricating, Package and Grease, Pressure Stills, Main Office, Yard Division, and All Others. For most of these subdepartments there was a corresponding craft department; for example, there existed a separate acid department. The acid department had a line of progression for its white employees; the entry level position was called "Sulphur Recovery Plant Helper," and the top position was called "Contact Operator." The labor subdepartment, entitled "Acid Plant Department," had its own line of progression, with the entry level position called "Laborer," and the top position called "Utility Man No. 1." While technically part of the labor department, this subdepartment actually worked with the (craft) acid department.

At least three of the labor subdepartments, Garage & Waste Oil, Main Office, and Yard Division, did not work directly with any of the craft departments. These subdepartments also had lines of progression. The employees in the "All Other" labor subdepartment worked with a number of craft departments and would move between them as required. For example, these employees would work with the pipefitting department for a few months, and then be assigned to work with the boilermaking department when labor-type work arose in that department. This subdepartment also had an established line of progression.

this division, one denoted "White" for its employees and the other denoted "Colored" for the assigned labor sub-department employees.

Although black laborers worked in many of the same departments as white craft employees, they could not bid into the more desirable white lines of progression.[7] A gentlemen's agreement, to which Gulf was not a party,[8] existed between Local 23 and Local 254 which prevented members of either local from bidding on the jobs of the other. This agreement remained in force until 1954, at which time it was temporarily suspended due to pressure from black employees. Ten black employees were permitted to enter white lines of

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[7]The white lines of progression, were more desirable because they paid more, had greater responsibility, and required more skill than the black lines of progression.

[8]Although this agreement was not incorporated into contracts between the OCAW and Gulf, credible evidence that Gulf supported and encouraged its enforcement was introduced.

progression in 1954, but no further transfers were allowed until 1956.

Between 1954 and 1956, the craft and labor departments were assigned to one of two divisions. The craft departments were assigned to the Operating and Mechanical O & M Division, and the labor department, with its various subdepartments, was assigned to the Labor Division. The composition of these departments and subdepartments and their lines of progression remained basically unchanged. Approximately twenty of the craft departments, now in the O & M Division, had labor subdepartments assigned to them, and the two separate lines of progression found in these integrated departments before the adoption of the divisional system remained. The labor department employees were technically in the Labor Division even though they physically worked in craft departments in the O & M Division. The labels on the seniority rosters in these integrated departments were

changed from "White" to "Operating and Mechanical Division" and from "Colored" to "Labor Division."

As of 1956, both black and white employees progressed up their promotional lines based on plant seniority and ability to perform. Newly hired blacks would be assigned to one of the labor subdepartments in the Labor Division, while newly hired whites would be assigned to one of the craft departments in the O & M Division. The gentlemen's agreement between the two locals prevented blacks who progressed to the top positions in their promotional lines from bidding into one of the O & M Divisions lines of progression.[9]

The 1956 contract between Gulf and the OCAW made the "Laborer" classification in the Labor Division

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[9]We use the phase "O & M Division lines of progression" to mean the various lines of progression in the craft departments, which by 1956 had been assigned to the O & M Division. Similarly, we use the phase "Labor Division lines of progression" to mean the various lines of progression in the labor subdepartments which had been assigned to the Labor Division.

the entry level position for all employees, both black and white.[10] A high school diploma or its equivalent and adequate performance on a number of tests were required before one could gain employment. After progressing to the top position in one of the Labor lines of progression, an employee could transfer to an entry level position in one of the O & M lines of progression after bidding into the mechanical helper pool, which was a classification apparently created to provide apprentice-type instruction for employees entering an O & M line of progression.[11]

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[10]The "Laborer" classification before 1956 was the entry level position for all of the lines of progression in the labor subdepartments. Therefore, an employee hired as a laborer could work with any one of the approximately twenty integrated craft departments depending on the particular labor subdepartment to which he was assigned. The 1956 contract made the laborer classification the entry level position for all newly hired employees, but did not otherwise change its nature.

[11]For example, a black or white employee hired in 1956 into the "All Other" Labor subdepartment would start as a Laborer. The employees in this subdepartment worked with various craft departments, such as pipefitting and boilermaking, as laborer related work arose in these departments. The "All Other" labor subdepartment had a particular line of progression and advancement to the next highest job classification in that line was based on plant seniority and ability to perform. The top labor position in this line

Bids were selected on the basis of plant seniority. The high school diploma test performance requirements were applicable to transferees who had not previously fulfilled these requirements because hired before 1956.

An employee who successfully bid into an O & M line of progression was assigned dual seniority: O & M Division seniority and plant seniority. Regardless of how much plant seniority a transferee accumulated in the Labor Division, he started with one day's O & M Division seniority for purposes of promotions and demotions in his

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of progression was the "Utility Man Special," and once achieved, the employee could bid into the mechanical helper pool.

The employee's movement from the Utility Man Special position to the mechanical helper pool resulted in the change of his divisional classification from the Labor Division to the O & M Division. From the mechanical helper pool, the employee could bid into one of the craft department lines of progression, such as the pipefitting department. The entry level job in this line of progression was the "Pipefitter Helper." The employee would then promote through this line of progression.

particular O & M line of progression.[12] Plant seniority was important if workforce reductions occurred because a transferee could use this seniority to return to the Labor Division, where plant seniority determined promotions and demotions within that Division.

The effect of this system on black employees hired before 1956 is, in part, the basis for plaintiffs' claim concerning the seniority system. A black employee, hired into the Labor Division in 1950 and who transferred to an O & M line of progression in 1960, would have less O & M Division seniority than a white employee hired in 1955 into the same O & M line of progression. For the purpose of obtaining a promotion to the next highest job

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[12]Using the example developed in footnote 11, on the day that the employee became a Pipefitter Helper, he had only one days' seniority for purposes of promoting to the next highest job classification in the pipefitting department's line of progression. The Labor Division seniority that he had accumulated as he progressed from a Laborer to a Utility Man Special could not be used in the pipefitting department. This seniority was not totally forfeited: if workforce reductions were required, the employee could be sent back to the "All Other" labor subdepartment where his accumulated seniority would dictate his position within that subdepartment.

classification in the O & M line of progression, the black transferee would have only one day's divisional seniority, compared to the white employee's five years' divisional seniority. If workforce reductions were required in 1961, then the black employee could be required to return to the Labor Division, where his eleven years of plant seniority would control his status in that Division.

In 1963, the one-day divisional seniority rule and the high school diploma[13] and test performance requirements were eliminated. Plant seniority became the basis for all promotions, demotions and lay offs. The effect of this change was that blacks with more plant seniority, but less O & M Division seniority, than whites in the same job classification could compete for promotions to the next highest classification based upon

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[13]A high school diploma was no longer required before one could transfer from the Labor to the O & M Division; however, until 1971 a diploma was required for new employment.

their longer plant seniority, thereby bypassing white employees with greater O & M Division seniority.[14] Also in 1963, the two OCAW locals that had separately represented black and white employees merged into Local 4-23, and the facilities at the refinery, such as bathrooms, locker rooms, cafeterias and drinking fountains, were integrated.

B. Analysis

Plaintiffs contend that Gulf's pre-Title VII Act ("pre-Act") seniority system had a discriminatory impact on senior[15] black employees after the effective date of

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[14]For example, a black hired in 1950 and who transferred to an O & M line of progression in 1960 would, as of 1963, have 13 years of plant seniority and 3 years of O & M Division seniority. A white hired in 1955 into the same O & M line of progression would, as of 1963, have 8 years of both plant and divisional seniority. If the black and white employee were in the same job classification and a vacancy opened in the next highest job classification, then, as between these employees, the black, with his 13 years of plant seniority, would be the senior bidder.

[15]We use the term "senior" to denote black employees hired before 1956. Plaintiffs' claim concerning Gulf's seniority system, and their next claim concerning Stipulation 29, relate only to employees hired before 1956.

Title VII,[16] and that the defendants failed to prove that the seniority system was bona fide under § 703(h). Before examining plaintiffs' contentions, we review the relevant law.

Section 703(a), 42 U.S.C. § 2000e-2(a), proscribes discriminatory employment practices, including discrimination "with respect to . . . compensation, terms, conditions, or privileges of employment" on the basis of race. Section 703(h) insulates bona fide seniority systems from the dictates of § 703(a), by providing that,

> [n]ot withstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color . . . .

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[16]July 2, 1965.

Until the *Teamsters* decision in 1977, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), courts generally rejected the contention that if an employer ceased all discriminatory practices on the effective date of the Act and had a seniority system that was facially neutral, then the system was necessarily protected under § 703(h). *See Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC v. United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (1970); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968). The *Quarles* court held that a seniority system that perpetuated, or locked in, the effects of past discrimination was not bona fide, and concluded that "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act." *Quarles*, 279 F. Supp. at 516.

The Supreme Court rejected this reasoning in *Teamsters*. In that case, the Court found systematic and purposeful discrimination in hiring, assignment, transfer and promotion policies before and after the effective date of the Act and, consistent with its 1976 decision in *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976),[17] awarded retroactive seniority to post-Act discriminatees. With respect to pre-Act discriminatees, however, the Court held that relief was unavailable, and, rejecting the *Quarles* rationale, found that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." *Teamsters*, 431

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[17]In *Franks*, the seniority system itself was not challenged. The Court in that case found discriminatory hiring practices after the effective date of Title VII, and the issue presented was whether § 703(h) barred the award of retroactive seniority to remedy the effects of this post-Act discrimination. The Court held that § 703(h) was not intended to bar otherwise appropriate relief once an illegal discriminatory practice occurring after the effective date of the Act has been proved.

U.S. at 353-54, 97 S.Ct. at 1864. In finding that the seniority system was bona fide, the Court noted that it "did not have its genesis in racial discrimination, and . . . it was negotiated and has been maintained free from any illegal purpose." *Id.* at 356, 97 S.Ct. at 1865.[18]

After *Teamsters*, courts presented with the question of whether a seniority system, neutral on its face, is bona fide must determine "whether there has been purposeful discrimination in connection with the establishment or continuation of [the] seniority system." *James v. Stockham Valves & Fitting Co.*, 559 F.2d 310, 351 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978). This court in *James* set forth four factors, used by

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[18]The Court decided *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), on the same day as *Teamsters*. The Court in *Evans* held that a seniority system does not independently violate Title VII simply because it perpetuates the effects of prior discriminatory acts even if those acts occurred after the effective date of Title VII. *Id.* at 560, 97 S.Ct. at 1890.

the Supreme Court in *Teamsters*, relevant to making this determination. The four factors are:

> (1) whether the seniority system operates to discourage all employees equally from transferring between seniority units;
> (2) whether the seniority units are in the same or separate bargaining units . . .;
> (3) whether the seniority system had its genesis in racial discrimination; and
> (4) whether the system was negotiated and has been maintained free of any illegal purpose.

James, 559 F.2d at 352.

The district court, after applying these four factors to the seniority system as it existed between 1956 and 1963, concluded that the system was bona fide. Plaintiffs do not take issue with the court's resolution of the first two *James* factors. Gulf's seniority system on the effective date of Title VII was facially neutral. In 1963, plant seniority became the basis for all promotions, demotions and layoffs, and the one-day divisional seniority rule was abolished. The two OCAW Locals, which were always in the same bargaining unit, merged in 1963. Therefore, on

the effective date of Title VII, there was only one seniority unit and one bargaining unit. Although the district court should have applied the first two *James* factors to the seniority system as it existed after the effective date of Title VII, instead of to the 1956-1963 system, the court was clearly correct in resolving these factors in favor of Gulf and the OCAW.

The gravamen of plaintiffs' challenge to Gulf's seniority system is their contention that the system had its genesis in racial discrimination and that it has been maintained, as evidenced by Stipulation 29, with an illegal (discriminatory) purpose. We first examine plaintiffs' claim that the seniority system had its genesis in racial discrimination.

Plaintiffs argue that before 1956 black and white employees performed basically the same type of work within the integrated departments and that the separation of blacks into the Labor Division, and whites into the O

& M Division, was expressly racial. Plaintiffs also argue that the 1956 one-day divisional seniority rule and diploma and test performance requirements were designed to inhibit blacks from transferring into the O & M lines of progression by subjecting blacks to seniority forfeiture upon transfer and by imposing requirements not applied to incumbent whites in the O & M Division. Plaintiffs conclude that these considerations show an intent to discriminate, thereby making Gulf's seniority system non-bona fide.

The one-day divisional seniority rule of the 1956 contract effectively operated to penalize blacks who attempted to move into the O & M Division. Although the rule was not as egregious as the "seniority suicide" provisions found in *Terrell v. United States Pile & Foundry Co.*, 644 F.2d 1112, 1118 (5th Cir. 1981), *vacated*, 456 U.S. 955, 102 S.Ct. 2028, 72 L.Ed.2d 479 (1982); *United States v. Georgia Power Co.*, 634 F.2d 929, 931 (5th Cir. 1981),

vacated, 456 U.S. 952, 102 S.Ct. 2026, 72 L.Ed.2d 477 (1982); *Swint v. Pullman-Standard*, 624 F.2d 525, 527 (5th Cir. 1980), *rev'd*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982), which required total seniority forfeiture upon transfer, the mere fact that blacks faced with layoff could regain their Labor Division seniority by returning to the Labor Division is insufficient to refute pre-Act discriminatory intent. In addition, the district court's characterization of Gulf's diploma and test performance requirements as nondiscriminatory on the ground that they applied to all employees is unconvincing. First, as the district court itself recognized later in its opinion, a test applied to all employees may nevertheless be discriminatory. Second, because these requirements applied only to newly hired employees and employees seeking to transfer into the O & M Division, the court's finding that they applied equally to all employees is incorrect. Employees in the O & M Division in 1956 (all of

whom were white) were not required to have a diploma or take any tests.

Although we infer discriminatory intent from Gulf's pre-Act seniority system, we question whether a seniority system which is neutral as of the effective date of Title VII, which is based on plant seniority, and which has a single bargaining unit could ever be held unlawful solely because of pre-Act discrimination. That the 1963 changes did not rectify the effects of past discrimination, and in fact operated in some ways to lock those effects in, does not imply, in the absence of purposeful discrimination in connection with the post-Act system, that this system was not bona fide under § 703(h). *See Teamsters*, 431 U.S. at 353, 97 S.Ct. at 1863 (seniority system does not become illegal "simply because it allows the full exercise of the pre-Act seniority rights of employees of a company that discriminates before Title VII was enacted"). The record does not, however, warrant our determination of post-Act

bona fides, and we must remand for a district court finding. The problem is Stipulation 29, discussed below, which was implemented in 1967 after Title VII was in effect. The district court must make findings relative to the discriminatory effect of Stipulation 29 and, considering Stipulation 29, the bona fides of the seniority system after 1965.

III. *Stipulation 29*

Plaintiffs contend that the implementation of Stipulation 29, which was an agreement negotiated by Gulf and OCAW reclassifying certain employees, not only constituted purposeful post-Act discrimination in violation of the fourth *James* factor, but also had an unlawfully discriminatory impact on black employees under the rationale set forth in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). Before examining this claim, a review of Stipulation 29 and the 1967 administrative reorganization is in order.

A. Background

In 1967 the refinery was administratively reorganized, and Gulf and the OCAW implemented Stipulation 29. The combined effect of these two events was to substantially reduce and simplify the lines of progression. In describing these events, we focus on the eleven OCAW maintenance departments[19] because it is the employees in these departments, or who were about to enter these departments, that were affected by Stipulation 29.

The structure of the refinery as it existed prior to 1967 has already been described. Before turning to the 1967 changes, one additional fact is necessary. In 1947 a four-year on-the-job mechanical training program had been established to train skilled employees for the number

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[19]These OCAW maintenance departments were: Bath House, Boilermaking, Carpenter, Garage, Instrument, Insulating, Motor Transportation, Paint, Pipefitting, Tin and Lead, and Welding.

one position in thirteen of the craft departments, eleven of which were the OCAW crafts.[20] To gain entrance into one of the programs, employees in the number two positions in their craft lines of progression were required to bid for trainee job vacancies and pass certain reading comprehension and arithmetic tests.[21] A successful bidder became a "Mechanical Trainee" and upon the completion of the program became a "No. 1 Mechanic" or "Craftsman" in the craft for which he was trained.

The 1967 reorganization split of the O & M Division, which had been comprised of various operations and maintenance departments, into two divisions; an Operating Division to which the operating departments were assigned, and a Maintenance Division to which the maintenance departments were assigned. The eleven

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[20]Before the 1967 reorganization, these departments were in the O & M Division.

[21]These tests form the basis for plaintiffs' next claim, discussed *infra* under the heading "Craft Tests."

OCAW craft departments were assigned to the Maintenance Division. The Labor Division was eliminated, and its subdepartments, which had their own lines of progressions and which had throughout the refinery's history been assigned to work with the various operations and maintenance departments, were combined with these departments.[22] The mechanical helper pool and certain job classifications in the labor lines of progression were abolished. Incumbent employees in the mechanical helper pool were reclassified as "Utility Men" and incumbent employees in the eliminated job classifications were reclassified as either "Utility Men" or "Laborers."

The effect of this reorganization on the lines of progression cannot be understood without first examining

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[22] *See supra* note 6 for a discussion of the labor departmental structure.

Stipulation 29.[23] This Stipulation, which was incorporated into the 1967 articles of agreement between Gulf and OCAW and which became effective on January 1, 1967 with the reorganization, eliminated all job classifications below the mechanical training programs (the "Craft Helper" positions) in most of the eleven OCAW departments and moved the employees in these

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[23]Stipulation 29 provided that:

> All employees in the mechanical sections below the Mechanic classifications, excluding employees in the Bathhouse Attendant, Truck Driver, Lift Truck Operator, Truck Driver Special, and Truck Driver Electrical classifications, will be given the opportunity to enter a special training program to become mechanics in their respective sections. These employees will be required to pass a simple test, as determined by the Company, in order to qualify for training. After passing the required test, employees will be placed in a training program for two years, to be trained as the Company desires.

Certain job classifications (e.g. Bathhouse Attendant, Truck Driver) were not reclassified into the special two year training program because, defendants assert, employees in these classifications did not receive the type of experience which would qualify them for top positions. Plaintiffs point out that these excluded classifications were primarily composed of black employees. Under a 1971 conciliation agreement between Gulf and the EEOC, employees that were excluded from special treatment under Stipulation 29 were offered placement in special two-year training programs and backpay. *See infra* note 28.

classifications into the mechanical training programs. For these employees, the training programs were reduced from four to two years and the reading and arithmetic tests were suspended in lieu of a simple two-page test which only one employee failed[24].

The new lines of progression can best be illustrated by example.[25] Before the reorganization and Stipulation 29, a new employee would be assigned to the Labor Division as a "Laborer" in one of the labor subdepartment lines of progression. On the basis of plant seniority, the employee would eventually promote to the top classification in his line of progression, which was, in most labor lines of progression, called "Utility Man No. 1." He would then bid into the mechanical helper pool, which

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[24]The training programs for reclassified employees were special. The four-year duration and testing requirements remained for all other employees seeking to bid into the regular mechanical training programs.

[25]See Appendix following opinion.

was technically in the O & M Division, and then enter one of the craft departments, such as the instrument department. (Alternatively, he could bid directly from his Utility Man position into one of the craft departments without first entering the mechanical helper pool.) Promotion from the Labor Division to the O & M Division, and promotions within the O & M Division, were based on plant seniority and ability to perform. The entry level position in the instrument line of progression was "Instrument Man No. 3," and the next highest job classification was "Instrument Man No. 2." From the number two position the employee would bid into the four-year mechanical training program. The senior bidder was required to pass the reading and arithmetic tests before he could enter the program and become a "Mechanical Trainee." Upon completion of this program, the employee would become an "Instrument Man No. 1," which was the top position in the instrument department.

The 1967 reorganization, while eliminating the Labor Division, did not eliminate labor jobs. After 1967, a newly hired employee would be assigned to the Maintenance Division as a "Laborer" and would promote directly into the position of "Utility Man." As a Laborer or Utility Man, he would work with any one or more of the maintenance departments in the Maintenance Division. The fact that Stipulation 29 eliminated the Instrument Man No. 2 and No. 3 positions, by moving these employees into the special two-year mechanical training program, and the reorganization eliminated the mechanical helper pool, by moving these employees into the Utility Man classification, meant that the employee, upon reaching the Utility Man position, would bid directly into the instrument mechanical training program.[26] The

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[26]An OCAW employee in the Utility Man position could bid into any of the eleven OCAW training programs, depending upon which programs had vacancies, and was not confined to entering the instrument program and becoming an Instrument Man. No. 1. For example, an employee could bid into the boilermaking trainee

training program that the employee would bid into was not the special two-year program applicable to reclassified employees, but was the normal four-year program established in 1947. Upon completion of this program, the employee would become an "Instrument Man," the top position in the instrument department.

B. Analysis

Plaintiffs contend that the Craft Helpers reclassified as Mechanical Trainees by Stipulation 29 were predominantly white employees with less seniority than blacks in certain lower job classifications. Before Stipulation 29 these more senior blacks,[27] plaintiffs argue, were in a position to promote into Craft Helper positions

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program if a vacancy arose and become a "Layerout," which is the top position in the boilermaking department. The same is true of the other OCAW maintenance departments.

[27]By "more senior blacks" we mean blacks who, as of 1967, had more plant seniority but were in lower job classifications than whites in Craft Helper positions. This situation arose in large degree due to the 1956-1963 one-day O & M Division seniority rule. Therefore, the black employees with which we are presently concerned were all hired before 1956.

and then, once a vacancy opened in a mechanical training program, bypass whites with less seniority who were already Craft Helpers. Plaintiffs' statistics show that only nine out of the two hundred and three, or 4.4%, of the Craft Helpers reclassified by Stipulation 29 into the special two-year training programs were black. They contend that this proportion is far lower than the proportion of blacks among senior utility men, the proportion of blacks among senior employees throughout the refinery, or the proportion of blacks among the entire plant workforce. Plaintiffs also claim that Stipulation 29 flooded the top jobs with less senior white and locked the senior black employees in lower job classifications out of these jobs for the next ten years. Plaintiffs conclude that Stipulation 29 constituted purposeful discrimination by abrogating black employees' seniority rights and had an unlawful discriminatory impact upon blacks under the

rationale of *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

The district court, while not addressing plaintiffs' claim that Stipulation 29 constituted purposeful discrimination, held that Stipulation 29 did not constitute a *Griggs* violation. It appears that the court based its decision on either a finding that the plaintiffs did not establish adverse impact, or on a 1971 conciliation agreement between Gulf and EEOC which elevated black employees, who had been demoted to the Labor Division while the 1956-1963 one-day divisional seniority rule was in force and thus were absent from Craft Helper positions when Stipulation 29 was implemented, to top positions in the maintenance departments at competitive rates of pay. We decline to base our determination upon the 1971 conciliation agreement because we find that its terms were

not coextensive with plaintiffs' present claim,[28] and instead turn to an examination of plaintiffs' proof of adverse impact.

To establish a prima facie case of adverse impact, plaintiffs must, by a preponderance of the evidence, demonstrate that Stipulation 29 had an adverse impact on blacks at a substantially disproportionately higher rate than whites. No intent to discriminate need be shown. *Teamsters*, 431 U.S. at 335 n. 15, 97 S.Ct. at 1854 n. 15. Once established, the burden shifts to the defendants to demonstrate, by a preponderance of the evidence, that

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[28]The 1971 conciliation agreement remedied a number of areas of alleged noncompliance with Executive Order 11246. Among its major provisions, it required the validation of certain tests and the elevation of certain employees (the "Affected Class") hired before 1956 to higher job classifications with backpay. Among the effected class were employees expressly precluded from the terms of Stipulation 29, *see supra* note 23, as well as employees who, between 1956 and 1963 when the one-day seniority rule was in effect, were bumped from the O & M Division to the Labor Division and were therefore not in Craft Helper positions when Stipulation 29 was implemented. Employees not covered by the conciliation agreement, but within plaintiffs' class, are blacks hired before 1956 who remained in the Labor Division between 1956 and 1963 and who, as of 1966, had more plant seniority than whites in Craft Helper positions.

legitimate business reasons justify the adoption of Stipulation 29. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975); *Griggs*, 401 U.S. at 431-32, 91 S.Ct. at 853-54; *Page v. U.S. Industries, Inc.*, 726 F.2d 1038, 1053 (5th Cir. 1984). If defendants make the requisite showing, then the burden shifts to plaintiffs to prove that other less discriminatory means were available to achieve defendants' legitimate business purpose. *See Albemarle*, 422 U.S. at 425, 95 S.Ct. at 2375.

Plaintiffs make two claims of adverse impact in connection with Stipulation 29. First, they claim that the proportion of blacks reclassified (into the *special* two-year training programs) as Mechanical Trainees from Craft Helper positions *under* Stipulation 29 was less than the proportion of senior black employees in certain lower job classifications. In response to this claim, the district court

held that the employees who were reclassified under Stipulation 29 would have reached the mechanical trainee programs first under the old system, and thus there was no adverse impact. Second, plaintiffs claim that as a *result* of Stipulation 29, blacks were locked out of top positions (the *regular* four-year training programs and number one jobs) for the next ten years. Although the district court did not address this contention, the evidence conclusively resolves the issue.[29]

Turning to plaintiffs' first claim, we hold that Stipulation 29 had an adverse impact on blacks at a substantially higher rate than on whites. The record indicates that only 4.4% of employees reclassified as Mechanical Trainees by Stipulation 29 were black and

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[29]The parties were asked at oral argument to supplement their briefs with specific information concerning the adverse impact of Stipulation 29. The information subsequently provided was already in the record; the parties merely consolidated the relevant facts into an easily usable form. The underlying facts upon which we base our holding concerning the lock-out effect of Stipulation 29 are not in dispute.

that, due to Gulf's pre-Act seniority system, 100% of the employees in the Utility Man classification in the Labor Division (in 1966) were blacks[30] with, almost universally, more seniority than whites reclassified as Mechanical Trainees. Before Stipulation 29, these senior blacks enjoyed the possibility of promotion into Craft Helper positions and, from there, they could have bid into one of the four-year mechanical training programs. Because of their greater plant seniority, they would have been senior to many of the whites in the Craft Helper positions and therefore would have had the opportunity to bypass them.

The defendants argue that many factors could have prevented the senior blacks from exercising their superior plant seniority to bypass junior whites under the pre-Stipulation 29 structure. Such factors include the

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[30]The seniority roster for December 1, 1966 indicates that there were 18 blacks in the highest job classification in the Labor Division and no whites. These black employees were hired between 1925 and 1941. Many white Craft Helpers reclassified as Mechanical Trainees were hired after 1941.

employee's absence, sickness and accident, safety, and disciplinary records, as well as the employee's failure to fulfill the six-month residency requirement in the job classification below the classification for which the employee was bidding and the employee's failure to pass a physical examination. This speculation has no effect; plaintiffs could not now prove that senior blacks would have inevitably bypassed junior whites. Plaintiffs need only prove, as they did, that senior blacks were denied the *opportunity* to bypass junior whites to establish a prima facie case of adverse impact. *See Connecticut v. Teal*, 457 U.S. 440, 451, 102 S.Ct. 2525, 2532-33, 73 L.Ed.2d 130 (1982) ("[t]he suggestion that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees [the plaintiff] the *opportunity* to compete equally with white workers on the basis of job-related criteria" (emphasis in original)).

Turning to plaintiffs' second claim, we find that as a result of Stipulation 29 blacks were not locked out of top positions for ten years. Between 1957 and 1984, the Port Arthur Refinery experienced a 51% reduction in force, from 5,481 employees in 1957 to 2,872 employees in 1984. During this period, black representation in the workforce increased from 16% to 21%. The number of available mechanical training positions and number one craft jobs increased from 490 in 1966 to 764 in 1967, and remained relatively constant thereafter. Therefore, Stipulation 29 actually increased the number of top jobs. It also had the effect of eliminating many intermediate job classifications, thereby making upward mobility to the top craft jobs easier. Before 1967, the mechanical training programs contained virtually no blacks,[31] however, the percentage of blacks entering the regular training

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[31]In 1966, there were 28 whites and 1 black in mechanical training programs.

programs between 1967 and 1977 was 21.6%.[32] In 1977, blacks represented 19% of the workforce.[33]

While we reject the plaintiffs' claim that as a *result* of Stipulation 29 blacks were locked out of the regular four-year training programs and number one craft jobs for ten years, the first claim of adverse impact was established by plaintiffs. In 1967 many blacks lost the *opportunity* to use their superior seniority to bypass junior whites and as a consequence arrived at top positions at a later time than they would have absent Stipulation 29. Because the district court held that plaintiffs did not establish adverse impact, it did not consider Gulf's evidence that legitimate business reasons justified the adoption of Stipulation 29. *See Albemarle*, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375. As

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[32]During this period, 330 non-black and 91 black employees entered these programs.

[33]Although Gulf's hiring practices are not at issue, evidence that the community surrounding the Port Arthur refinery is approximately 19% black was introduced.

noted earlier, the district court also did not address plaintiffs' claim that Stipulation 29 evidenced purposeful discrimination, the establishment of which is essential to plaintiffs' claim that the seniority system was not bona fide under § 703(h). The district court must now resolve these issues.

IV. *Craft Tests*

Since 1947 when Gulf established the mechanical training programs in the maintenance departments, senior bidders have been required to perform adequately on a battery of tests.[34] The same tests have been administered for each of the mechanical (or "craft") training programs. From 1947 to 1971 the "old tests"[35] were used to screen

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[34]*See supra* note 21 and related text.

[35]The old tests consisted of six separate tests: (A) Test of Reading Comprehension; (B) Test of Arithmetic Fundamentals; (C) Wonderlic Personnel Test; (D) Mechanical Aptitudes Test; (E) Mechanical Insight Test; (F) Lee-Clark Arithmetic Test.

bidders, and since 1971 the "new tests"[36] have been administered. Gulf considered test results along with other qualifications to determine whether senior bidders would be awarded trainee positions; no cut-off scores were used.

In the district court, plaintiffs contended that both sets of tests had an adverse impact on blacks. Gulf responded that the tests were job related. The court upheld the tests' validity, finding that while both sets of tests had an adverse impact, Gulf was not required to validate the old tests and Gulf established, through a criteria validation study, that the new tests were job related. On appeal, plaintiffs argue that the new tests

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[36]The new tests consisted of four separate tests; (A) Bennett Mechanical Comprehension Test; (B) Test of Chemical Comprehension; (C) Arithmetic Test; (D) Test of Learning Ability. These tests were also used for the hiring of new employees. Therefore, employees hired after 1971 were not required to take any additional tests to enter one of the craft training programs.

were not properly validated and that Gulf is required to establish that the old tests were job related.

Section 703(h)[37] authorizes the use of professionally developed scored tests. The Supreme Court has construed this section "to require that employment tests be job related." *Griggs*, 401 U.S. at 435-36, 91 S.Ct. at 856. The plaintiffs bears the initial burden of establishing a prima facie case of substantial adverse impact by showing that significantly fewer members of plaintiff's class pass the test compared to their counterparts. Once established, the burden shifts to the defendant to show that the test is "job related." The plaintiff can rebut the defendant's evidence by showing that, although the test is job related, alternative selection

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[37]42 U.S.C. § 2000e-2(h)(1976). This section specifies that:

(h) Notwithstanding any other provision of this subchapter, it shall not be . . . unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

devices exist which have a comparable business utility, but a lesser adverse impact. *See Albemarle*, 422 U.S. at 425, 95 S.Ct. at 2375.

The district court found that use of the old and new tests had an adverse impact upon blacks.[38] As stated by the court, plaintiffs' evidence showed that:

> 82.5% of whites who took the Old Tests between January 1969 and March 1971 ultimately passed. Only 42.8% of blacks who took the same tests during that period ultimately passed. Between 1971 and 1980, 97.7% of the whites who took the New Tests passed them, while only 66% of the blacks who took those tests passed.

Gulf does not contest this finding, but argues that it has met its burden of showing that the tests are job related.

Before turning to Gulf's proof, we must first address the burden imposed upon a defendant to show

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[38]The court applied the "four-fifths rule" under 20 C.F.R. 1607.4(D) (1987). The rule specifies that:

> "A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, . . ."

the job relatedness of a discriminatory test. The district court relief on *Contreras v. City of Los Angeles*, 656 F.2d 1267 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021, 102 S.Ct. 1719, 72 L.Ed.2d 140 (1982), for the proposition that an employer must by professionally accepted methods, prove that the test is "predictive of or significantly correlated with important elements of work behavior that comprise or are relevant to the job or jobs for which candidates are being evaluated." *Id.* at 1280 (the "significantly correlated" standard). This burden departs somewhat from the stricter standard set forth by this Circuit in *Watkins v. Scott Paper Co.*, 530 F.2d 1159 (5th Cir.), *cert. denied*, 429 U.S. 861, 97 S.Ct. 163, 50 L.Ed.2d 139 (1976), which requires an employer to prove that its selection device was necessary to the business goals of safety and efficiency. *Id.* at 1168-69 (the "business necessity" standard).

Recent Supreme Court cases suggest that the burden to be borne by employers when establishing a defense to discriminatory selection devices is embodied in the "significantly correlated," rather than the "business necessity," standard. An excellent discussion of these standards is contained in *Contreras*, in which the Ninth Circuit concluded that the business necessity language was inconsistent with Supreme Court case law and the congressional intent underlying Title VII. 656 F.2d at 1280. The *Contreras* court drew its "significantly correlated" language from *Albemarle*, in which the Supreme Court "clarified" the "appropriate standard of proof for job relatedness," 422 U.S. at 436, 95 S.Ct. at 2380, by articulating a standard that is "the same as that of the *Griggs* case--that discriminatory tests are impermissible unless shown, by professionally accepted methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs

for which candidates are being evaluated.'" *Id.* at 431, 95 S.Ct. at 2378 (quoting 29 C.F.R. § 1607.4(c); *Contreras*, 656 F.2d at 1279.[39]

The court in *Contreras* addressed a division within the Ninth Circuit between courts which adopted the "significantly correlated" standard in *Albemarle* and a court which adopted the stricter "business necessity" standard set forth in a footnote in *Dothard v. Rawlinson*, 433 U.S.321, 332 n. 14, 97 S.Ct. 2720, 2728, n. 14, 53 L.Ed.2d 786 (1977). In *Dothard*, the Supreme Court held that "the employer must meet 'the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.'" *Id.* at 329, 97 S.Ct. at 2727

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[39]In *Griggs*, the Supreme Court held that:

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

401 U.S. at 431, 91 S.Ct. at 853.

(quoting *Griggs*, 401 U.S. at 432, 91 S.Ct. at 854). While the holding is consistent with prior Supreme Court cases, a footnote specified that "a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge." 433 U.S. at 332 n. 14, 97 S.Ct. at 2728 n. 14.

The Supreme Court has since indicated that the "significantly correlated" standard, rather than the "business necessity" standard, is controlling. *See Contreras*, 656 F.2d at 1279-80. In *New York City Transit Authority v. Beazer*, 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979), plaintiffs challenged a transit authority's (TA) refusal to hire methadone users. The Court stated:

> Respondents recognize, and the findings of the District Court establish, that TA's legitimate employment goals of safety and efficiency require that exclusion of all users of illegal narcotics, barbiturates, and amphetamines, and of a majority of all methadone users. The District Court also held that those goals require the exclusion of all methadone users from the 25% of its positions that are 'safety sensitive.' Finally, the District Court

> noted that those goals are significantly served by--*even if they do not require*--TA's rule as it applied to all methadone users including those who are seeking employment in non-safety-sensitive positions. *The record thus demonstrates that TA's rule bears a 'manifest relationship to the employment in question.' Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280.

Id. at 587 n. 31, 99 S.Ct. at 1366 n. 31 (emphasis added) (citation omitted); *see Contreras*, 656 F.2d at 1279-80.

Fifth Circuit cases decided after *Beazer* and *Contreras* have imposed a less strict standard than business necessity upon defendants seeking to show that their selection devices are job related. In *Rivera v. City of Wichita Falls*, 665 F.2d 531 (5th Cir. 1982), we affirmed a district court's determination that a police test was job related without requiring a further showing that the test was necessary to the safety and efficiency of the police unit. *Id.* at 536-38. Likewise, in *Cormier v. P.P.G. Industries, Inc.*, 702 F.2d 567 (5th Cir. 1983), we affirmed a

district court's decision that the defendant successfully rebutted plaintiff's prima facie case of adverse impact by showing that its tests had "a manifest and legitimate and business relationship to the jobs for which the tests were used." *Id.* at 568.

We conclude that the business necessity standard adopted in *Watkins*[40] has been modified by subsequent

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[40]*Watkins*, 530 F.2d 1159, and the two primary cases upon which it relied for the business necessity standard, *United States v. Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971), were decided before *Teamsters*, 431 U.S. 324, 97 S.Ct. 1843. As we discussed earlier in connection with Gulf's seniority system, *Teamsters* held that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." 431 U.S. at 353-54, 97 S.Ct. at 1864.

Jacksonville and *Bethlehem* both involved challenges to seniority systems which perpetuated prior discrimination and in each case, the court cited *Quarles*, 279 F. Supp. 505 (E.D. Va. 1968) and *Local 189, United Papermakers*, 416 F.2d 980 (5th Cir. 1969), for the proposition (rejected in *Teamsters*) that a neutral seniority system that merely perpetuates past discrimination is not bona fide under § 703(h).

In *Watkins*, the business necessity standard was derived from Bethlehem Steel:

> [T]he "business necessity" doctrine must mean more than that transfer and seniority policies serve legitimate management functions. Otherwise, all but the most blatantly discriminatory plans would be excused even if they perpetuated the effects of past discrimination. Clearly such a result is not

Supreme Court decisions, as recognized by Fifth Circuit panels, and hold that discriminatory tests are impermissible unless shown, by professionally accepted methods, to be predictive of or significantly correlated with important elements of work behavior that comprise or are relevant to the job or jobs for which candidates are being evaluated.

> correct under Title VII. Necessity connotes an irresistible demand. To be preserved, the seniority and transfer system must not only directly foster safety and efficiency of a plant, but also be essential to those goals. If the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued.

Bethlehem Steel, 446 F.2d at 662 (citations omitted) (quoted by *Watkins*, 530 F.2d at 1168). This standard was extended in Watkins to selection criteria, such as hiring and testing.

We note that the basis upon which *Bethlehem Steel* and *Jacksonville* rests was undermined by *Teamsters*, but make no comment concerning the likely disposition of those cases if decided today or the applicability of the business necessity standard to the circumstances presented therein. Our holding today concerns only defendant's burden in showing that a discriminatory test is job related.

A. The Job Relatedness of the New Tests

In 1969, Gulf hired Richardson, Bellows and Henry ("RBH"), an outside consulting firm of industrial psychologists, to develop the new tests. This firm conducted three criteria validation studies in 1971, 1974 and 1983 to establish the job relatedness of these tests. Criterion related validation is established when there is a significant positive correlation between comparative success on the test (the "predictor") and comparative success on some measure of job performance. The degree of correlation between test scores and job performance is expressed by a correlation coefficient. The value of the correlation coefficient can range from + 1.0 (employees with the highest test scores always perform better on the job) to -1.0 (employees with the highest test scores always perform worse on the job). A coefficient of zero indicates that there is no correlation between test and job performance.

Gulf primarily relied upon the 1983 study to establish the validity of its new tests. Although the same tests were administered to senior bidders seeking positions in all of the OCAW craft training programs, the study only yielded correlation coefficients with respect to the pipefitting and boilermaking departments.[41] Because the

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[41]The 1983 study involved numerous Gulf facilities, including the Port Arthur, Alliance, Cincinnati, Philadelphia, and Sante Fe refineries and the Orange,Cedar Bayou, St. James, Jayhawk and Marietta chemical plants. Job analysis and performance rating data were collected from all of these locations. Because job classifications between the refineries and chemical plants were similar (i.e. a pipefitter at the Port Arthur refinery performed the same type of work as a pipefitter at the Cincinnati refinery), the criteria used to evaluate job performance at each location was the same. Virtually all of the employees in the study had taken the new tests.

Test scores were compared to job performance for a number of job classifications many of which were not among the craft positions with which we are presently concerned (i.e. Laboratory Technicians, Operators, non-OCAW crafts). The study attempted to establish the validity of the new tests for five of the OCAW crafts: boilermaking, pipefitting, welding, carpenter and instrument. However, RBH was unable to validate the tests for the latter three crafts. The job performance ratings for the welders were too similar to establish a significant correlation between test and job performance. In the case of carpenters and instrument mechanics, the ratings given by the two raters used to evaluate job performance (each employee was evaluated by two supervisors and their ratings were compared to derive a single job performance rating) differed to such a degree that RBH concluded that neither rating was a reliable measure of the employees' job performance. Therefore, the 1985 study introduced into evidence contained data about only two of the craft departments, boilermaking and pipefitting.

tests in the Gulf battery were not used separately, the total battery scaled score comprised the predictor.[42]

Plaintiffs' primary objection to the 1983 study centers upon the criteria, called the "performance elements,"[43] used by supervisors to evaluate the job performance of incumbent employees in the pipefitting and boilermaking departments.[44] In developing the criteria, RBH first directed supervisors to rate the relative

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[42]In other words, it was an employee's performance on the entire test battery, not the employee's performance on any one of the four new tests, that was compared to the employee's rating on job performance.

[43]The performance elements were: (1) learning new procedures quickly; (2) knowing when to get help; (3) handling several tasks at once; (4) understanding written instructions; (5) understanding oral instructions; (6) working without supervision; (7) paying attention to detail; (8) passing on instructions to others; (9) training other employees; (10) taking a systematic approach to work; (11) planning own work; (12) following standard operating procedures; (13) identifying problem situations quickly; (14) making accurate entries in logs or records; (15) completing assignments on time; (16) reading prints and diagrams; (17) setting priorities; (18) devising creative solutions; (19) remembering large amounts of detail; (20) making on-the-spot decisions; (21) communicating orally; and (22) working with others.

[44]Employees in the top positions and training programs in these departments were evaluated.

importance of 117 duties and 37 abilities.[45] The duty elements were intended to provide RBH with a better understanding of the tasks performed in each job classification, while the ability elements were the focus of the criterion development. The specific criteria selected by RBH for inclusion in the rating form were based upon the importance attached to the various ability elements by the supervisors.[46]

Plaintiffs contend that the validation study was improperly conducted because the criteria used to evaluate job performance were related to general

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[45]A questionnaire, entitled "Job Requirements Questionnaire for Maintenance, Construction, Operating, and Technical Classifications" ("JRQ"), which contained the duty and ability elements, was submitted to supervisors at all of the locations studied. The supervisors were directed to rate each duty and ability element on a four-point scale, which indicated the importance of each. The criteria ultimately chosen to evaluate job performance were derived from the supervisors' responses to the JRQ. Each criteria element selected for inclusion in the rating form was a significant job requirement (taken from the "ability element" list) as indicated by a consistently substantial JRQ rating and ratable element on which meaningful performance evaluations could be based.

[46]*See supra* note 45. The same rating form was used to evaluate all of the jobs studied at all of the locations.

cognitive abilities and not specific job duties.[47] In other words, plaintiffs argue that the criteria used did not consist of "important elements of work behavior that comprise or are relevant to the job."[48] *See Albemarle*, 422 U.S. at 431, 95 S.Ct. at 2378. Therefore, plaintiffs conclude, the correlation coefficients derived from the 1983 study cannot

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[47]Supervisors listed the ten most important duties of boilermakers as: (1) using common hand-held non-power tools; (2) following safety procedures; (3) working at heights over four feet; (4) using common hand-held power tools; (5) working as a member of a team; (6) carrying out simple oral instructions; (7) working outside; (8) using handling and lifting devices; (9) repairing frames and platforms; and (10) maintaining a clean work area.

Supervisors listed the ten most important duties of pipefitters as: (1) assembling piping; (2) using common hand-held non-power tools; (3) maintaining clean work area; (4) working outside; (5) following established safety procedures; (6) working at heights over four feet; (7) using common held-held power tools; (8) carrying out simple oral instructions; (9) performing simple arithmetic calculations; and (10) climbing ladders.

[48]Plaintiffs specifically argue that the performance elements (*see supra* note 43) used to evaluate job performance of incumbent employees in the boilermaking and pipefitting training programs and top jobs had virtually nothing in common with the actual duties which supervisors rated as important in these jobs (*see supra* note 47). For example, plaintiffs note that the performance elements contained only two duty elements which the supervisors rated in the top ten category of importance in the boilermaking department: following oral instructions and working as a team. Additionally, certain performance elements, such as recording data and preparing records, were ranked by the supervisors as relatively unimportant.

be used to establish a significant relationship between test and job performance.

The district court found that the criteria employed by RBH accurately reflected the important elements that comprise the jobs studied. The court noted that "about one-half of [Gulf's] criteria are actual duty elements of the same character of Plaintiffs." In reaching its conclusion, the court emphasized that the positions for which adequate test performance was a prerequisite required certain cognitive abilities, and that performance on tests which were designed to correlate solely with the duty elements would be a poor predictor of job performance.

We find no error in the district court's determination. Upon successful completion of a training program, an employee promotes to the top position for which he has been trained. Gulf's proof supports the conclusion that the possession of certain cognitive abilities

is important to success as a trainee and craftsman.[49]

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[49]Gulf introduced job descriptions and a compilation of the required abilities for top craftsmen. Among the basic requirements are the following:

1. must be able to read and write;
2. must be able to comprehend verbal and written instructions and be able to perform work assignments within his craft with or without assistance and with minimum supervision;
3. must be knowledgeable of applicable safety procedures, work practices, and guidelines covering the work;
4. must be familiar with and competent in the use of tools and equipment peculiar to his/her craft;
5. must be capable in taking the lead in performing work assignments and must be able to train and demonstrate proper craft techniques and skills to apprentices assigned for on-the-job training; and
6. must be accountable and responsible that the quantity and quality of his/her workmanship is inherently correct and within the recognized-accepted norm. Job performance must be executed in a manner that does not present a fire or safety hazard to personnel or equipment.

All craftsmen must possess the abilities and skills needed to fulfill the basic requirements. In addition, each particular craft has specific requirements. For example, pipefitters are required to:

1. be knowledgeable of applicable procedures, work practices, codes and guidelines governing the fabrication and installation of pipe;
2. be able to read and work from blueprints; must be able to measure, sketch, and make drawings, including calculations for routine and complex piping designs; must be able to develop bills of material for piping fabrication jobs and be knowledgeable with the stores' catalog system; and
3. be competent in fabricating of pipe systems, install and remove pipeline blanks, hook up test pumps, and hydrostatically test pipe systems, set up and operate hydro-blasting equipment, chemical cleaning equipment, sandblasting equipment, pipethreading machines, pipe bending machines, and burning equipment.

Plaintiffs offered no evidence to show that the exclusive use of duty elements as criteria would have yielded lower correlation coefficients. To the contrary, Gulf's expert testified that higher correlation coefficients would result had RBH selected duty elements as the measure against which job performance was judged. Under these circumstances, we find that the criteria used to evaluate job performance consisted of important elements relevant to the jobs studied.

This holding does not necessarily lead to the conclusion that the tests are job related; it only establishes that a proper rating system was used to evaluate job performance. To establish the job relatedness of the tests, the degree of correlation between test scores and job performance ratings must be examined. The district court upheld the validity of the tests without making any findings concerning the sufficiency of correlation. Because a finding of significant correlation between test results and

job performance is a prerequisite to a holding that the tests are job related, we assume that the court *sub silentio* made this finding.

Plaintiffs challenge the validity of the tests as they relate to all of the OCAW maintenance departments. The 1983 study yielded correlation coefficients for only the pipefitting and boilermaking departments.[50] The unadjusted coefficients[51] were, for pipefitters .22, and for boilermakers .32. When adjusted for criteria unreliability the coefficients were .23 and .51 respectively, and when adjusted for battery score restriction, the coefficients were .27 and .38 respectively. While Gulf's experts testified that the unadjusted figures underestimated the coefficients' true values, the record contains little evidence concerning the reliability of the adjusted figures.

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[50] *See supra* note 41.

[51] These coefficients have not been adjusted for restriction in range, less than perfectly reliable measures of test and job performance, and small sample size.

Gulf's expert, Dr. Hunter, testified that the results of an American Petroleum Institute (API) study, which synthesized forty-two local validation studies performed by companies in the petroleum industry on tests similar to those used by Gulf, indicated that Gulf's tests are job related. Using the methodology of the API study, Dr. Hunter recomputed the results of the 1983 RBH study and derived a correlation coefficient, for maintenance, operations and laboratory technician employees, of .37.[52]

From this evidence, it is not possible to determine the basis for the district court's holding that the tests are job related. We are troubled by the fact that Gulf submitted correlation coefficients for only two maintenance departments and did not attempt to show that the tests were valid with respect to the other OCAW

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[52]This recomputation compared test results to job performance in all of the job classifications for which the RBH study was conducted, not just the maintenance departments. *See supra* note 41.

maintenance departments.[53] We therefore remand this cause to the district court for further findings. The court is directed to hold evidentiary hearings as it deems necessary, and to take into consideration the relationship between test scores and job performance in all of the departments which comprise the basis for plaintiffs' complaint.[54] In determining whether the tests are signif-

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[53]Actually, the RBH study attempted, but was unable, to validate the tests with respect to the welding, carpenter and instrument departments. *See supra* note 41. However, no attempt was made to validate the tests with respect to the other OCAW maintenance departments.

[54]We recognize that this will require Gulf to submit further evidence on the relationship between test scores and job performance in the OCAW maintenance departments, with the exception of the pipefitting and boilermaking departments. In its 1983 study, RBH obtained correlation coefficients which indicated the similarity between certain departments; for example, the correlation based on ability elements between boilermakers and instrument mechanics was .78 (the "similarity coefficient"). *See* defendants' exhibit 126, page 28. The correlation coefficient for instrument mechanics was then computed by multiplying the unadjusted coefficient for boilermakers, .32, with the similarity coefficient, .78, which resulted in a figure of .24. *See* defendants' exhibit 129.

If the district court finds this method to be reliable, then it may permit Gulf to establish the necessary correlation coefficients in ths manner. The court may also require Gulf to present other forms of evidence to establish the relationship between test scores and job performance as it deems necessary.

icantly correlated with job performance, the court should specifically set forth the reasons that justify its determination, including any correlation coefficients upon which it relies and an explanation for its reliance.

B. The Old Tests

The district court held that, as a matter of law, Gulf was not required to validate the old tests. The court's analysis of this issue was as follows:

> So far as the Old Tests are concerned, Gulf was not required to validate them, for the reason that the Old Tests were eliminated four years before *Albemarle Paper Co. v. Moody*, 422 U.S. 405 [95 S.Ct. 2362, 45 L.Ed.2d 280] (1975), imposed validation requirements; and seven years before The Equal Employment Opportunity Guidelines in Employee Selection Procedures instigated validated studies.

We find that while it may not be possible at the present time to conduct a criteria validation study on the old tests, Gulf still bears the burden of establishing that these tests were job related. The old tests were used until 1971, and as early as 1966 Gulf had notice that the

administration of non-job related tests was prohibited.[55] The Supreme Court in *Griggs* invalidated tests which had been in use since 1965. 401 U.S. at 428, 91 S.Ct. at 852.

On remand, the district court is directed to determine whether the old tests were job related. Given the impracticality of requiring that a validation study be conducted, Gulf may establish the job relatedness of the old tests through other methods.[56] *See e.g., Davis v. City of Dallas*, 777 F.2d 205, 221-23 (5th Cir. 1985), *cert. denied*, 476 U.S. 1116, 106 S.Ct. 1972, 90 L.Ed.2d 656 (1986); B. Schlei & P. Grossman, *Employment Discrimination Law* 14-56 (2d ed. 1983).

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[55]The EEOC Guidelines on Employment Testing Procedures, issued in August 1966, prohibited the use of non-job related tests. The Supreme Court in *Griggs* relied upon these guidelines. 401 U.S. at 433-34, 91 S.Ct. at 854-55.

[56]At trial, Gulf attempted to establish the job relatedness of the old tests through a method called "path analysis." This method relied upon the results of the criteria validation study on the new tests to establish correlation coefficients for the old tests. We reserve consideration of the reliability of this method and leave this determination to the district court.

V. *Disparate Treatment*

Plaintiffs raise two claims of classwide disparate treatment concerning Gulf's application of its Sickness and Accident ("S & A") policy and Gulf's selection of supervisors. To establish these claims, plaintiffs must prove that Gulf intentionally discriminated against blacks on a regular basis. *Teamsters*, 431 U.S. at 366 & n. 16, 97 S.Ct. at 1855 & n. 16. Proof of "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts" is required. *Id.* Statistics establishing a great disparity between Gulf's treatment of blacks and whites may alone justify an inference of discriminatory motive. *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 817 (5th Cir.), *cert. denied*, 459 U.S. 1038, 103 S.Ct. 451, 74 L.Ed.2d 605 (1982). If statistical evidence is insufficient to establish discriminatory intent, the plaintiffs may introduce historical, individual, or circumstantial evidence. *Id. See Walls v. Mississippi State Dep't of Pub.*

Welfare, 730 F.2d 306, 321-22 (5th Cir. 1984); *Page v U.S. Indus., Inc.*, 726 F.2d 1038, 1046 (5th Cir. 1984); *Pouncy v. Prudential Ins. Co. of Am.*, 668 F.2d 795, 802 (5th Cir. 1982). Gulf may rebut plaintiffs' prima facie case by introducing proof that plaintiffs' statistics are "inaccurate or insignificant," *Payne*, 673 F.2d at 817, or by providing a "non-discriminatory explanation for the apparently discriminatory result," *id.* (quoting *Teamsters*, 431 U.S. at 360 n. 46, 97 S.Ct. at 1867 n. 46).

Before turning to a discussion of plaintiffs' specific allegations, we note that the ultimate determination of the existence of intentional discrimination is a question of fact, reviewed on appeal under the clearly erroneous standard. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985); *Page*, 726 F.2d at 1044-45.

A. Discriminatory Application of Sickness and Accident Policy

An employee's bid for certain desirable positions, such as supervisory and mechanical trainee positions, triggers an examination of his S & A record to determine whether absences are excessive. A record indicating more than 80 hours of S & A in the preceding year is carefully scrutinized and may result in disqualification. Plaintiffs introduced statistical evidence which purported to show that between 1975 and 1980, 33.1% of all black bidders and 22.0% of all white bidders were rejected because of their unsatisfactory S & A records, and anecdotal testimony from three witnesses which attempted to establish individual acts of discrimination.

At trial, plaintiffs argued that Gulf's policy had an adverse impact on blacks and that Gulf subjected black employees to disparate treatment. The district court held that, "Gulf's S & A policy was applied equally to blacks

and white. Hence, even if Gulf's S & A policy resulted in adverse impact on blacks, its use is justified as good business practice under Title VII." (citation omitted). On appeal, plaintiffs do not advance their adverse impact claim but instead contend only that Gulf intentionally discriminated against blacks in the application of its S & A policy.

Gulf's evidence establishes that the average number of S & A hours for bypassed whites was 188.5 while the corresponding figure for bypassed blacks was 220 hours. These numbers tend to show that Gulf did not discriminatorily apply its S & A policy to the disadvantage of blacks. We find the anecdotal testimony of plaintiffs' witnesses insufficient to establish classwide disparate treatment. We therefore agree with the district court and hold that plaintiffs have failed to prove that Gulf engaged in intentional discrimination.

B. Discriminatory Selection of Supervisors

Gulf promoted upper level hourly employees to supervisory positions. Supervisors are not covered by the labor agreement, and before 1982 the selection process was not formalized. Employees with departmental experience and knowledge, good attendance and safety records, and strong interpersonal, oral and written communications skills were selected for supervisory positions. Between 1965 and 1982, there were 231 promotions to supervisor, with 22, or 9.5%, going to blacks.[57]

Plaintiffs contend that blacks were selected as supervisors at rates inconsistent with black representation in the refinery's hourly workforce. Plaintiffs attempted to establish a prima facie case of disparate treatment by

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[57]The district court stated that "[p]laintiffs further contend that between 1965 and 1982, there were a total of 209 promotions to supervisor, with 22 or 10.5% going to blacks." This is a misstatement of the statistics as set forth in plaintiffs' exhibit number 16, which reflects the figures we have used.

introducing statistical evidence and anecdotal testimony from four witnesses. Gulf rebutted plaintiffs' statistical evidence by arguing that the relevant eligibility pool for supervisory positions was composed of employees in the top positions and introduced evidence showing that between 1967 and 1982 blacks composed only 13.27%[58] of this pool. Gulf also introduced statistics showing that blacks were promoted to supervisor after they had averaged approximately 19 years at the plant and approximately 3 years in the top job, while whites were promoted after they had averaged approximately 26 years at the plant and 8 1/2 years in the top job. The district court, after reviewing this evidence, found that Gulf's policy of promoting experienced employees was justified and held that, "[a]lthough Gulf's standards of selection

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[58]The district court stated that between 1967 and 1982 "blacks constituted 11.35% of the top job employees; 13.7% of the supervisory positions went to blacks." However, defendants' exhibit number 117 indicates that blacks constituted 13.27% of the top-job employees and 11.35% of the supervisory positions went to blacks.

were unwritten and subjective, the Court finds no evidence that the standards were discriminatorily applied. The evidence presented does not demonstrate that Gulf intended to discriminate, or, from a statistical standpoint, that it did discriminate in promoting craftsmen to supervisory jobs."

On appeal, plaintiffs contend that the district court improperly evaluated Gulf's total record instead of examining specific time periods when few blacks were promoted to supervisory positions. Plaintiffs note that out of 36 employees promoted to supervisor between 1965 and 1970 there was only one black. We find this argument meritless because relatively few blacks held top jobs during this time period and separate analysis would improperly incorporate the effects of pre-Act discrimination. We agree with the district court that plaintiffs' statistical and anecdotal testimony did not establish that Gulf intended to discriminate.

VI. *Individual Claims*

The named plaintiffs asserted individual as well as classwide claims. To the extent that we have upheld the district court's ruling on the classwide claims, plaintiffs' individual claims based upon these allegations are foreclosed. *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 880-81, 104 S.Ct. 2794, 2801-02, 81 L.Ed.2d 718 (1984). Resolution of plaintiffs' individual claims concerning adverse treatment under the seniority system, Stipulation 29, and the craft tests is reserved until the district court considers whether these claims (on a classwide basis) have merit on remand.

In considering plaintiffs' individual claims of intentional racial discrimination, the district court correctly looked to the four-prong test set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824 36 L.Ed.2d 668 (1973). The court stated that:

> [t]he Plaintiff must prove that (1) he belongs to a group protected by Title VII, (2) he was qualified for the job, (3) he was not promoted, and (4) the employer promoted one not in Plaintiff's protected class. If Plaintiff makes out a prima facie case, the employer must produce "evidence that the plaintiff was rejected, or someone else was preferred, for legitimate, non-discriminatory reasons." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 [101 S.Ct. 1089, 1094, 67 L.Ed.2d 207] (1981). If the employer meets this burden, "the presumption of discrimination 'drops from the case,' and the District Court is in a position to decide . . . whether the particular employment decision at issue was made on the basis of race." *Cooper v. Federal Bank*, [467 U.S. 867] 104 S.Ct. 2794 [81 L.Ed.2d 718] (1984).

The court held that none of plaintiffs' individual claims established a prima facie case of intentional discrimination.

Plaintiffs Hayes and Brown alleged that they were unlawfully denied supervisory positions. The district court rejected these claims, holding that these plaintiffs failed to establish a prima facie case because they never "applied" for such positions. The court failed to consider the fact that supervisory vacancies were not announced prior to

1982 and that no application process existed. It is not legally sufficient or legitimate for an employer to reject an employee who does not have notice or an opportunity to apply for a promotion. *See Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1134 (11th Cir. 1984). On remand, the district court is directed to reconsider Hayes' and Brown's evidence of intentional discrimination and Gulf's rebuttal evidence.

Plaintiff Tizeno also contended that he was discriminatorily denied a promotion to supervisor. Tizeno did not testify at trial because of illness; however, his deposition was admitted. His deposition reveals that a supervisory position was awarded to a white employee, Mr. Chesser, who had half the departmental experience of Tizeno. The district court held that, "[a]lthough he testifies that Mr. Chesser, a white employee, received a promotion he requested, Mr. Tizeno offers no evidence that he was better qualified for that position."

We find this ruling incorrect as a matter of law because a Title VII plaintiff is required to prove only that he was qualified for the position at issue, not that he was more qualified than the successful applicant. Although the evidence is slight, arguably Tizeno met this burden. On remand, the district court is directed to make further findings.

After carefully reviewing the record and the district court's disposition of the remaining individual claims of intentional discrimination, we find no error and affirm this part of the court's judgment.

Conclusion

We hold that the district court properly decertified the class to exclude employees who had signed releases, dismissed the Trade Unions, and excluded certain trial exhibits. We uphold the court's decision with respect to its disposition of the classwide claims concerning Gulf's application of its Sickness and Accident policy and Gulf's

selection of supervisors. We vacate the court's judgment because of the disposition of the issues of Gulf's seniority system, Stipulation 29 and the job relatedness of the new and old tests and direct the court on remand to make further findings. Specifically, the court is directed to determine: (1) whether Stipulation 29 evidenced purposeful discrimination and, if so, whether this post-Title VII act of discrimination, when combined with Gulf's pre-Title VII discrimination, is sufficient to demonstrate that the seniority system is not bona fide; (2) whether legitimate business reasons, sufficient to defeat plaintiffs' showing of adverse impact under *Griggs*, justified Gulf's adoption of Stipulation 29; (3) whether the degree of relationship between test scores on the new tests and job performance is sufficiently significant to establish that the new tests ajob related. If the court determines that the seniority system is not bona fide or that Stipulation 29 constituted a *Griggs* violation, then the court is directed to

consider whether the OCAW is liable due to its function as the union representative of the plaintiffs. On remand the court should hold evidentiary hearings as it deems necessary, make specific findings of fact, and specifically set forth the reasons that justify its determinations. We also vacate the court's judgment with respect to the individual claims of unlawful denial of promotion to supervisory positions by plaintiffs Hayes, Brown and Tizeno and direct the court to make further findings on remand. We affirm the court's judgment on the remaining individual claims.

AFFIRMED in part, VACATED in part and REMANDED.

APPENDIX

The chart below shows how the instrument department was affected by the reorganization and Stipulation 29. The ten other OCAW maintenance departments (with the exception of the bath and motor

transportation departments, *see supra* note 23) were similarly affected.

BEFORE REORGANIZATION & STIPULATION 29		AFTER REORGANIZATION & STIPULATION 29
O & M DIVISION[1]	LABOR DIVISION	MAINTENANCE DIVISION[5]
Instrument Depart.	Labor Subdepart.	Instrument
Instrument Man No.1		Instrument Man
Mechanical Trainee		Mechanical Trainee
Instrument Man No.2 (Craft Helper)[2]		Utility Man
Instrument Man No.3 (Craft Helper)		Laborer
Mechanical Helper Pool[3]		
	Utility Man No.1	
	(Intermediate Job Classifications)[4]	
	Laborer	

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1 The O&M Division had many departments, only the instrument department is shown here.

2 The Instrument Man No. 2 and No. 3 classifications were collectively referred to as Craft Helper positions. All maintenance departments had Craft Helper positions, but the number of job classifications which composed these positions differed between departments. Stipulation 29 eliminated all of these Craft Helper positions and moved incumbent employees into special two-year training programs.

3 Employees in the mechanical helper pool were not confined to entering the instrument department but could also bid into entry level jobs in other departments in the O & M Division.

4 There were a number of subdepartments in the Labor Division, and many had job classifications between Laborer and utility Man No. 1. These classifications were eliminated by the reorganization, and the incumbent employees were reclassified as either "Utility Men" or "Laborers."

5 The Maintenance Division, after the reorganization, was composed of fourteen departments. An OCAW employee in the Utility Man position could bid into any one of the training programs associated with the eleven OCAW departments, depending upon which program had vacancies.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

WESLEY P. BERNARD, ET AL.,	:	
	:	CIVIL
vs.	:	ACTION
	:	No.
GULF OIL CORPORATION, ET AL.,	:	B-76-183-CA

ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW MANDATED BY THE FIFTH CIRCUIT COURT OF APPEALS

FINDINGS OF FACT

PROCEDURAL HISTORY

This class action was commenced on May 18, 1976, against Gulf and the Oil, Chemical and Atomic Workers' International Union, Local Union No. 4-23, Plant Group ("OCAW") by six black employees of Gulf's Port Arthur, Texas, refinery ("the Refinery"). The suit alleged that Gulf and the OCAW had engaged in racial discrimination prohibited by Title VII of the Civil Rights Act of 1964, 42

U.S.C. Sec. 2000-3 [sic] *et seq.* and the Civil Rights Act of 1866, 42 U.S.C. Sec. 1981.

Since the action was filed, Gulf Oil Corporation has merged with Chevron U.S.A. Inc., a wholly-owned subsidiary of Chevron Corporation. However, at all times relevant to the instant lawsuit, Gulf was a Pennsylvania corporation, doing business in Texas and operating an oil refinery in Port Arthur, Texas. Gulf was engaged in interstate commerce and employed more than 15 persons.

The suit was based on an administrative charge of discrimination filed on June 24, 1967, by Wesley Bernard and others against Gulf and the OCAW. The Equal Employment Opportunity Commission ("EEOC") issued right to sue letters on June 11, 1976. The Court has jurisdiction of Gulf and the OCAW for allegedly discriminatory acts occurring on or after December 26, 1966.

Trial was held in April, 1984. On September 18, 1986, this court issued a memorandum opinion finding for Gulf and the OCAW on all issues raised by the Complaint, and the Plaintiffs appealed. In an opinion dated March 22, 1988, a panel of the United States Court of Appeals for the Fifth Circuit affirmed this court's decision in part. It affirmed this court's evidentiary rulings, decisions as to class certification, and dismissal of non-OCAW unions. It further affirmed this court's findings that Gulf had not discriminated against the class in applying its sickness and accident policy or in appointing supervisors from the hourly ranks. It also affirmed this court's finding that Gulf had not committed discrimination against Wesley Bernard individually in not appointing him to a supervisory job, and affirmed this court's findings regarding individual claims of plaintiffs Johnson and Whitley. Finally, it affirmed this court's finding that the

methods used in Gulf's studies, undertaken to validate certain tests (the "New Tests"), were proper.

The Court of Appeals vacated certain other aspects of this court's opinion, and remanded for further findings. Specifically, it directed this court to consider whether Stipulation 29, a provision in the 1967 Collective Bargaining Agreement between Gulf and the OCAW, evidenced intentional discrimination. If it did, the Appeals Court directed this court to consider whether this fact rendered the seniority system negotiated by Gulf and the OCAW other than *bona fide*, and also to consider Gulf and the OCAW's defense that Stipulation 29 was implemented for legitimate business reasons. The Court of Appeals also directed this court to provide further findings on whether and why the validation studies undertaken by Gulf demonstrated that Gulf's New Tests were job related. With respect to a different group of tests ("the Old Tests") that could not be validated through

a formal study, the Appeals Court directed this court to make findings on whether Gulf had shown those tests to be job related by other acceptable methods. Finally, the Court of Appeals directed this court to make further findings on whether Gulf had individually discriminated against Messrs. Hayes, Brown and Tizeno in not promoting them to supervisory jobs.

I. THE SENIORITY SYSTEM AND STIPULATION 29

1.

The Port Arthur Refinery has existed since around 1903, and lines of promotion have existed there at least since 1934. T 13, 649, 681. Since 1943, T 687-688, the OCAW (Plant Group) and its predecessor unions have traditionally represented employees in operations jobs, labor jobs, and a number of crafts not represented by other unions. The OCAW's representation includes negotiation of the seniority system and lines of promotion

therein. In 1947, Gulf and the OCAW negotiated the first Mechanical Training Programs for certain OCAW crafts. T 654. These made available to the OCAW craftsmen a program similar to the apprenticeships in crafts represented by other unions. T 31, 985. In 1967, by means of Stipulation 29 to the 1967 Collective Bargaining Agreement between Gulf and the OCAW, similar programs were established for most of the remaining OCAW crafts. T 33, Class Certification Hearing JDX-B-2.

2.

Stipulation 29 essentially eliminated all jobs in the maintenance craft lines of promotion except the No. 1 Craftsman, the Mechanic Trainee, and the Truck Driver classification in the Equipment Operator line. T 658, DX 40. Incumbents of the eliminated jobs were given a simple test, T 31, and those who passed were placed in a two-year Mechanical Training Program to become No.

1 craftsmen. The people who were placed in the two-year program had all been in their craft line for at least ten years, T 28, 984. For historical reasons, most of them (though not all) were white.

3.

Dr. Milden J. Fox is an expert in Industrial Relations who testified at the trial. Dr. Fox conducted his doctoral dissertation in 1969, before this lawsuit was filed. As part of his dissertation, Dr. Fox studied four Golden Triangle refineries. Dr. Fox's dissertation was introduced in evidence as DX 85, and Dr. Fox testified at the trial that Stipulation 29 was part of an ongoing effort to improve efficiency at the Refinery. He testified that labor shortages occurred during the war. T 693-694. The manpower problems stemming from these labor shortages led to inefficient use of personnel. T 690, 693-694, DX 85, p. 56-67.

Dr. Fox testified that before the Suez crisis in 1956, the demand for refined petroleum was such that inefficiencies could be tolerated. T 693. However, supertankers built to meet the Suez crisis reduced the demand for U.S. refined petroleum products, and American refineries began to experience losses. T 695, DX 85. The Port Arthur Refinery was charged with an operating loss in 1958 of $18 million, DX 85, p. 114. Labor, particularly maintenance labor, was a significant component of the excess costs, and the method of making work assignments contributed significantly to the problem. DX 85, p. 114-115. Gulf's management responded with cost-cutting measures, including work force reductions through attrition and layoff. DX 85, T 697. Refinery management also sought to increase the efficiency of the work force through measures permitting more flexible use of employees. T 694-696, 670A, 698; DX 85. Among

these measures were an "incidental and related" clause, T 699, 979-980, and Stipulation 29. T 674A; DX 85, p. 120.

5.

Before Stipulation 29 was implemented, the maintenance crafts were characterized by complex lines of promotion, at the top of which was a No. 1 craft job. DX 38. Before efficiency measures were introduced, only those in a particular classification could perform work peculiar to that classification. This rule, together with complex promotion lines, contributed significantly to the inefficiencies. DX 85, p. 115.

6.

One of the first measures designed to alleviate the problem was adopted in 1959, when Gulf and the OCAW negotiated an "incidental and related" clause. T 699, DX 85, p. 116. This clause permitted a craftsman to do a small job of short duration, one that was usually the work of another craft, if it was incidental and related to his

primary job, and he could perform safely. T 699; DX 85, p. 116-117. The "incidental and related clause" significantly increased efficiency. T 670A-671A; DX 86.

7.

In 1962, Stipulation 33 was negotiated between Gulf and the OCAW. It permitted the company to assign journeyman craftsmen to help journeyman craftsman in other crafts, providing they were capable of doing the job and did not work overtime. DX 85, p. 119; T 672A-674A. This measure further increased efficiency, DX 87, and was a "breakthrough" in the work assignment area. DX 85, p. 119.

8.

Stipulation 29 was negotiated in 1967 as a furtherance of the two earlier measures. T 674A. By increasing the number of "universal mechanics", i.e., people who can perform any job associated with a particular craft,

Stipulation 29 further increased productivity. T 675A, 676A, 677-678A.

9.

Dr. Fox testified that all these measures, including Stipulation 29, conformed with industry practices at the time. T 682A. Each was undertaken for an economic purpose. T 671A, 673A, 682A. Dr. Fox's dissertation, written in 1969, attests to the success of the measures. DX 85, p. 126.

10.

Dr. Fox's testimony is fully consistent with the account of the economic impetus for Stipulation 29 given by Mr. Charles Draper, who spent over 30 years in the Refinery's personnel department. Class Certification Hearing Transcript, 139-140. It is also consistent with testimony of Mr. Ivan Hollier, who was a union officer for some 29 years. T 966. Mr. Hollier testified that the union acquiesced in these measures to avoid "contracting

out" and layoffs. T 980. With respect to Stipulation 29, the union welcomed it because it provided opportunities for employees to progress. T 983-984. Mr. Hollier expressly denied ever hearing anything suggesting that there was any motivation to impede black people in the adoption of Stipulation 29. T 983.

11.

The court concludes that the one-time reclassification of a group of employees in 1967 was undertaken for legitimate, economic reasons.

12.

The Craft Helpers reclassified under Stipulation 29 had at least ten years' experience in their craft. T 28, T 662. As Craft Helpers, they performed a significant amount of the work of the No. 1 (journeyman) craftsmen. T 984. Because of the amount of on-the-job training they had received, it would take minimal additional training to qualify them as journeyman craftsmen. T 984. Laborers

and Mechanical Helpers did not have comparable experience. T 657, T 706, T 712. Hence, they would require much more training to do the work of journeyman craftsmen efficiently and safely. It would have been inconsistent with the legitimate economic purposes of Stipulation 29 to have reclassified Mechanical Helpers and Laborers rather than the Craft Helpers. T 679A. The decision to reclassify Craft Helpers, but not Laborers or Mechanical Helpers, reflects the legitimate business reasons for Stipulation 29. It does not reflect purposeful racial discrimination.

13.

The record contains nothing from which the court could draw the inference that Stipulation 29 was purposefully discriminatory. Some 13 black employees, and one white, who were working at the Port Arthur Refinery in 1967 testified for the plaintiffs. One or two of these witnesses testified as to the adverse effects they

thought the timing of Stipulation 29 had on blacks. None testified to any fact raising a plausible inference that racial discrimination motivated Stipulation 29.

14.

Other evidence of Gulf's treatment of its black employees after the effective date of Title VII is inconsistent with the notion that Stipulation 29 was purposefully adopted to discriminate against blacks. Gulf has an excellent record on hiring black employees. Class Certification Hearing, 83-90; JDX-M through JDX-V. The proportion of blacks in the work force has increased, even though the total work force there has decreased. T 760, DX 83. Gulf has had an affirmative action program since 1965. T 752-753, even setting up schools designed to help people who had trouble advancing because of limited education or abilities, T 754-759. Two of these were established during the very time that Stipulation 29 was under consideration. T 754-755, DX 75, 76. In 1976, Gulf

sat up a night school program, for people in the lower job classifications, which it paid them to attend. T 756, DX 77. Gulf also conducted several formal studies of minority utilization at the Refinery, T 757-758, DX 80, 81, and held training sessions to promote racial sensitivity among supervisors. T 759.

15.

The record contains other evidence of Gulf's successful efforts at affirmative action. Black employees were accepted to the Mechanical Training Program with lower scores than their non-black counterparts. DX 112, 113 and 114, T 38, 885. The success rates of black bidders to the Mechanical Training Programs and other desirable jobs were comparable. DX 111, 115, 116, T 888-892. The proportion of blacks in the Mechanical Training Programs compares favorably with the proportion of blacks in the hourly work force at the Port Arthur Refinery. DX 110, T 877-878. Gulf also promoted black

hourly employees to supervisory positions with less plant seniority and less time in the relevant eligibility pool than it required for making similar promotions to white employees. DX 118, T 895-898. Gulf's affirmative action programs have effectively equalized the earnings of black and white employees hired after 1964, DX 119, DX 120, T 899-905.

16.

The Court concludes that, at the time Stipulation 29 was negotiated and implemented, the Plaintiffs were not as qualified for reclassification as were the Craft Helpers. The court is persuaded that the decision to reclassify the most qualified group, the Craft Helpers, does not evidence purposeful racial discrimination.

17.

Stipulation 29 was a part of the seniority system at Gulf.

18.

The seniority system at Gulf was at all times *bona fide*.

19.

The Court of Appeals found that Stipulation 29 adversely affected blacks. If Gulf and the OCAW were required to do so, they have demonstrated by a preponderance of the evidence that Stipulation 29 was justified by legitimate business reasons; see Findings of Fact Nos. 8-18, 21.

20.

Plaintiffs have offered no alternative method by which Gulf and the OCAW could have accomplished their legitimate business purpose with less adverse impact.

II. THE NEW TESTS

21.

Gulf has used the New Tests for selecting Mechanic Trainees since March, 1971. The battery consists of the

Test of Learning Ability, Test of Chemical Comprehension, Test of Mechanical Comprehension, and Tests off [sic] Arithmetic Reasoning. T 136; DX 124, 125, 126.

22.

According to PX 26, over a 9-1/2 year period, 20 blacks were denied promotions to Mechanical Training Programs based on their scores on the New Tests. During the same time period, two whites were denied admission to Mechanical Training Programs based on the New Tests. *Id.* The New Tests thus had adverse impact on black applicants to the Mechanical Training Programs, although the absolute amount of this impact (two blacks per year) is small.

23.

Plaintiffs' evidence groups all Mechanical Training Programs together. For any specific craft, Plaintiffs'

evidence does not reveal the existence or non-existence of adverse impact.

24.

Gulf has conducted three validity studies to assess the validity of the New Tests. T 1047, DX 124-126. The largest of these was completed in 1983 ("the 1983 Study"). DX 126.

25.

The 1983 Study was designed to validate use of the New Tests for many purposes that are no longer implicated in this lawsuit. It was not designed to focus primarily on either the OCAW maintenance departments, nor on the Mechanical Training Programs. DX 126, p. 1-6. It would be impossible to obtain meaningful validity data in many of these departments because of their small size, See JDX-81, which contaminates results. T 1335-1336. It is difficult to obtain stable validity data with samples as small as 67. T 1335, T 1340. Validity for

departments having a small number of members may thus be established in some other manner, providing it is reasonable and probably leads to the correct conclusion.

26.

Nevertheless, the 1983 Study reported that performance on the New Tests correlated .32 with job performance as a Boilermaker, and .22 with job performance as a Pipefitter. DX 126, p. 38, 40; T 1066. These correlations are both statistically significant. DX 126, p. 37, 39.

27.

The correlations are higher if adjusted for either battery score restriction, DX 126, p. 40, or for criterion unreliability, DX 126, p. 38. The adjusted figures reflect better estimates of validity than the unadjusted figures, as Dr. Sharf explained at the trial. T 1131. All are underestimates of the true validity of the New Tests. T 1039, T 1347, DX 126, p. 36. Gulf has shown by a

preponderance of the evidence that the New Tests are significantly correlated with performance as a boilermaker or pipefitter.

28.

The correlations reported in the 1983 Study are based on the performance both of trainees and journeyman craftsmen. The New Tests predict training performance to an even greater degree than post-training job performance. Had the 1983 Study included only trainees, the correlations would have been higher. T 1345, DX 137. T 1345, DX 137. *A fortiori*, Gulf has shown by a preponderance of the evidence that the New Tests are significantly correlated with performance as a boilermaker trainee or a pipefitter trainee.

29.

The Court of Appeals found that it was proper to emphasize the abilities required to perform craft jobs, and not just the specific duties involved in those jobs. 841

F.2d at 566. As a part of the 1983 Study, 37 abilities were rated by Gulf supervisors in terms of their importance to performance in each of the jobs studied. DX 126. Appendix A to Gulf's Brief on Remand.

30.

Twelve different abilities appeared in the ten most important abilities required of boilermakers and pipefitters at Port Arthur. These twelve are the ability to:

(a) plan and organize own work;
(b) know when to get help;
(c) understand written or oral instructions quickly;
(d) pay attention and keep track of detail;
(e) read and understand prints, layouts, diagrams, graphs, etc.;
(f) work with and get along with others;
(g) communicate orally;
(h) recognize trends indicated by instruments;
(i) train or coach others;
(j) work with minimal or no supervision;
(k) identify problem situations quickly;
(l) follow standard operating procedures.

The first eight of these abilities were among the ten most important for both Port Arthur boilermakers and Port

Arthur pipefitters. The next two were among the ten most important abilities of Port Arthur pipefitters (they were ranked No. 14 and 12 respectively for boilermakers) and the last two were among the ten most important abilities of Port Arthur boilermakers (they were ranked No. 12 and 14 respectively for pipefitters). The abilities associated with the jobs of boilermaker and pipefitter at Gulf are virtually identical, showing a similarity correlation coefficient of .96. DX 126, p. 28. If the abilities required to do these jobs were completely identical, and the supervisory ratings were perfectly accurate, the similarity correlation coefficient would be 1.00. T 1041.

31.

It was not feasible to complete a validation study on Port Arthur carpenters because performance ratings were too variable. DX 126, p. 33. This does not mean that the tests would be invalid, or that the validation of the New Tests failed for carpenters. It merely indicates

the presence of a contaminating factor that prevented collection of reliable data for a validity study. See T 1039. The ten most important abilities of Port Arthur carpenters include eight of the ten most important abilities of Port Arthur boilermakers; the other two are rated 11th and 13th in importance for boilermakers. Similarly, the ten *least* important abilities of Port Arthur boilermakers include nine of the abilities rated least important for Port Arthur carpenters. The correlation coefficient expressing the similarity of the abilities required of Gulf carpenters and boilermakers is .98. DX 126, p. 28. The abilities required to be a boilermaker and those required to be a carpenter at Gulf and at Port Arthur are thus virtually identical. Therefore, a test of cognitive abilities that predicts performance as a boilermaker will also predict performance as a carpenter. The New Tests, cognitive ability tests which predict important aspects of the

performance of boilermakers, also predict important aspects of the performance of carpenters.

32.

There were only 85 welders and welder trainees at Port Arthur in 1982. JDX-81. The job of welder at Port Arthur requires similar abilities to the jobs of boilermaker and pipefitter. Nine of the top ten abilities of Port Arthur welders are also in the top ten abilities of Port Arthur boilermakers and pipefitters (see Finding of Fact No. 30). The remaining ability is ranked 13th in importance for boilermakers and 17th for pipefitters. Seven of the least important abilities of Welders are among the least important abilities of boilermakers and pipefitters. There is no ability that is highly important for one craft (i.e., in the top ten) but insignificant for either of the others (i.e., in the bottom ten). The abilities required to be a welder show a correlation of .88 with those required to be a pipefitter and .92 with those required to be a boilermaker.

DX 126, p. 28. The New Tests validly predict important aspects of performance as a boilermaker and a pipefitter. Performance as a welder depends on the same abilities; therefore the New Tests predict important aspects of performance as a welder.

33.

There were only 70 instrument mechanics and trainees in 1982. JDX 81. The job of instrument mechanic at Gulf involves extremely similar abilities to the jobs of boilermaker, pipefitter and welder. The abilities required in the jobs of instrument mechanic at Gulf correlate .99 with those required in the jobs of pipefitter, boilermaker and welder combined (.78 with boilermaker, .73 with pipefitter, and .92 with welder), suggesting that all these jobs are very similar. All ten of the most important abilities of Port Arthur instrument mechanics also appear in the top ten abilities of Port Arthur boilermakers and pipefitters. Eight of the least important abilities of Port

Arthur instrument mechanics are among the least important abilities of Port Arthur boilermakers and pipefitters. Performance as an instrument mechanic therefore depends on the same abilities as does performance as a pipefitter or boilermaker. Because the New Tests predict important aspects of job performance for boilermakers and pipefitters, they also predict important aspects of performance for instrument mechanics.

34.

The 1983 Study did not include data on every one of the maintenance departments at Port Arthur, because many were too small to yield meaningful results. Craftsmen in the Tin and Lead department were not studied directly; there were only 15 of them in 1982. However, the record contains evidence that the No. 1 position in the Tin and Lead department at the Port Arthur Refinery is exceedingly similar to that of

Boilermaker. DX 61 contains descriptions of the requirements for all first-class craftsmen at Port Arthur, as well as the specific requirements for boilermakers and the No. 1 tinner/leadburner. In addition to the requirements of all first-class craftsmen, which are identical, the jobs of boilermaker and tinner/leadburner both require sketching and fabrication of metal objects and components, familiarity with burning and welding procedures, and competence with various kinds of machines – many of which are the same for both jobs. It is inconceivable that performance in these two jobs depends on significantly different abilities. The New Tests, which predict important aspects of the performance of boilermakers, predicts the performance of other jobs that depend on the same abilities. Therefore, the New Tests predict important aspects of the job of tinner/leadburner.

Certain qualifications are required of all craftsmen at Port Arthur, DX 61. Many of these qualifications relate closely to the most important abilities of Pipefitters and Boilermakers, for which crafts the New Tests are valid. For example, all craftsmen must be able to read and write ((c) and (e), Finding of Fact No. 30), comprehend verbal and written instructions and perform work assignments with or without assistance and with minimum supervision ((a), (c), and (j), Finding of Fact No. 30), be knowledgeable of applicable safety procedures, work practices and guidelines covering the work, and be familiar with and competent in the use of tools and equipment peculiar to his craft ((1), Finding of Fact No. 30), take the lead, demonstrate skills and train apprentices ((f), (g), and (i), Finding of Fact No. 30), and be accountable for the quality and quantity of his work ((a), (j) and (1), Finding of Fact No. 30). Because the New

Tests predict important aspects of boilermaker and pipefitter performance, it is likelier than not that they predict important aspects of jobs having similar important aspects.

36.

Dr. Jack Hunter testified concerning studies he had done for the American Petroleum Institute ("The API studies"), T 1332-1349, and summary accounts of these studies were introduced into evidence. DX 134, DX 135. These studies included each of the tests used in the New Test battery, T 1332, and the major job categories typically found in the petroleum industry. DX 134, p. 7-15; DX 135; p. 8-16. The API studies consisted of a statistical re-analysis of pooled data from validation studies conducted by the oil company members of the API, T 1335, T 1337, which permitted estimates of test validity to be based on much larger sample sizes than were available to individual companies. T 1335-1336.

37.

Based on his expertise in testing and statistics, as well as the results of the API studies, Dr. Hunter was of the opinion that the validity of the New Tests was virtually uniform across the major jobs in the petroleum industry, T 1388, and that there were no real differences in the validity of the tests from one company or location to another. T 1340-41. His opinion was uncontradicted.

38.

For maintenance jobs such as those in the Port Arthur Refinery's eleven OCAW maintenance departments with Mechanical Training Programs, the API studies reflected that the New Tests correlated .37 with job performance, and .65 with training performance. Dr. Hunter re-evaluated the data from Gulf's 1983 Study using the methodology of the API studies, and determined that the New Tests correlated .40 with performance on maintenance jobs at Gulf. T 1354-55. His testimony was

not contradicted, and such grouping is permitted by the Uniform Guidelines on Employee Selection Procedures. 29 CFR § 1607.14B.

39.

Based on the direct evidence of significant correlations between the New Tests and job performance in the boiler making and pipefitting departments, the court concludes that a preponderance of the evidence supports the finding that the New Tests are valid for selecting boilermakers and pipefitters.

40.

Based on the evidence of similarity between the jobs of Carpenter, Welder, Instrument Mechanic, and Tinner/Leadburner to the jobs of Boilermaker and Pipefitter, the court concludes that a preponderance of the evidence supports the finding that the New Tests are valid for selecting carpenters, welders, instrument mechanics, and tinner/leadburners.

41.

Based on Dr. Hunter's testimony regarding the API Generalization studies, and the other evidence of similarity among the No. 1 craft jobs at Gulf, the court concludes that a preponderance of the evidence supports the conclusion that the New Tests validly predict performance in the top jobs in each of the OCAW maintenance departments.

42.

Dr. Hunter testified that the New Tests correlated .65 with performance in training programs in jobs throughout the petroleum industry. While it is impossible to determine the precise correlation between the New Tests and each of the Mechanical Training Programs at Gulf, the court concludes that a preponderance of the evidence supports the conclusion that, even where a bare preponderance of the evidence supports the validity of the New Tests for selecting craftsmen, a greater preponder-

ance of the evidence supports the validity of the New Tests for selecting Craft Trainees.

43.

The simple test was only offered to persons who had ten years' or more on-the-job experience. There is no reason to believe that it would serve Gulf's legitimate business purposes if offered to persons without such experience.

THE OLD TESTS

44.

The Old Tests had adverse impact, although it was minimal. PX 25 showed that 8 out of 40 white testees were turned down for Mechanical Training Programs because of the Old Tests, but that 17 of 24 black testees during the same 2 1/4 year period were turned down. Had blacks performed as well as whites on the tests, about 6 rather than 17 would have been rejected. The adverse impact affected about 5 blacks per year.

45.

It is not practicable for Gulf to conduct formal validation studies on the Old Tests, which have not been used since 1971.

46.

At trial, Gulf introduced the results of a "path analysis", in which the validity of the New Tests was multiplied by the correlation between the new and the Old Tests. T 1070-1074; T 1356-1357, T 1381-1382; DX 128. This technique gives an estimate of the Old Tests' validity which is an absolute minimum, as both Gulf's experts testified. T 1072, 1382. The path analysis indicated that the Old Tests had an absolute minimum validity of .22 for selecting boilermakers and .16 for selecting pipefitters. Both experts considered the Old Tests valid, and Dr. Hunter assessed their validity at the same level as the New Tests. T 1073, T 1357. Based on the unchallenged testimony of the experts, the court concludes that the

actual correlation between the Old Tests and job performance was substantially greater than the minimum figures of .22 and .16. The court concludes that the correlations are high enough to demonstrate that the Old Tests were predictive of significant elements of the jobs of pipefitter and boilermaker.

47.

Based on the degree of similarity between the jobs of pipefitter and boilermaker and the jobs of welder, instrument mechanic, carpenter, and tinner/leadburner (see Findings of Fact Nos. 31 through 34), the court concludes that the Old Tests were predictive of significant elements of these jobs as well as the jobs of pipefitter and boilermaker.

48.

Based on Dr. Hunter's testimony regarding the API Generalization studies, and the other evidence of similarity among the abilities required to perform well in each of

the No. 1 craft jobs at Gulf, the court concludes that a preponderance of the evidence supports the conclusion that the New Tests validly predict performance in the top jobs in each of the OCAW maintenance departments.

49.

It is likely that the correlation between performance on the Old Tests and performance as a trainee is substantially higher than the correlation between Old Test performance and post-training job performance (see Finding of Fact No. 28). The court concludes that the Old Tests were predictive of significant elements of performance as a Mechanical Trainee in each of the OCAW craft departments.

50.

Both experts testified that, in their opinion, the Old Tests validly predicted performance in the jobs for which they were used. Dr. Sharf based his opinion on the pattern of validity evidence he observed in the path

analysis, T 1073. Dr. Hunter concluded that the Old Tests had a validity "not substantially different from" the New Tests. T 1357. Their testimony was not contradicted, either by Plaintiffs' statistician or their testing expert.

51.

The path analysis, the 1983 Study, and the testimony of Gulf's experts is the only evidence in the record on the validity of the Old Tests, and all the evidence is to the effect that the Old Tests predicted significant aspects of performance as a Mechanical Trainee. Gulf has therefore shown by a preponderance of the evidence that the Old Tests were valid predictors of significant aspects of performance in the jobs for which they were used.

IV. INDIVIDUAL CLAIMS

52.

During the period covered by this lawsuit, promotions were sometimes made from hourly to

supervisory positions. The process was informal. Jobs were not posted and there was no formal application process.

53.

Mr. Hayes and Mr. Brown complained that Gulf had not promoted them to permanent supervisory jobs.

54.

Mr. Hayes and Mr. Brown each testified that they had not made known to anyone in authority their interest in becoming supervisors; T 235, T 511-512.

55.

Mr. Draper testified that employees generally knew when they were eligible, and that they were invited to inform their supervisors of their interest. T 68. This testimony was not controverted; in fact, a number of black employees testified that they had told their supervisors that they were interested in such promotions. T 130, PX 93, para. 2, T 355, T 413, T 441, T 432. Some 22 blacks

were appointed to supervisory jobs during the period covered by this action. It is likely that they told someone in authority of their interest in the job. There was no evidence that white employees were appointed to supervisory jobs without ever telling anyone in authority of their interest.

56.

The process by which supervisors were selected from the hourly ranks during the time in question was informal, but it was not secret.

57.

Neither Mr. Hayes nor Mr. Brown testified that he did not know how to express interest, or who they should express it to. Mr. Brown's testimony suggests he knew how, but affirmatively chose to remain silent. T 511-512. The court infers that both men knew how to make their interest known to Gulf.

58.

There was no testimony or other evidence that all employees wanted to become supervisors. There are reasons why many employees would not wish to do so; it involves leaving the union, working during strikes, and the like. There is no reason to believe that Mr. Hayes' and Mr. Brown's supervisors knew of their interest in a supervisory position, despite their failure to mention it.

59.

Because of Mr. Brown's and Mr. Hayes' failure to express interest in a supervisory job, it is impossible to identify which promotion they did not get, and thus to tell whether a white or a black was selected in preference to them.

60.

Although white employees were made supervisors during the time period covered by this lawsuit, black employees were also made supervisors, in numbers

proportional to their representation in the qualified eligibility pool. DX 117; T. 893.

61.

The record contains evidence that Gulf practiced affirmative action in the selection of supervisors. Blacks were promoted to supervisor with less seniority, and less time in the No. 1 position, than whites. DX 118, T 895-896.

62.

Additionally, it is obvious that thousands of white employees were not appointed to supervisory positions during the time period in question. From the record, their circumstances are indistinguishable from those of Hayes and Brown, except that at least some of them probably expressed interest in such a promotion to their supervisors.

63.

Mr. Brown knew of a black supervisor in his department. T. 511-512. Mr. Hayes knew of about 17

blacks who had been promoted to supervisor, and admitted that the number could be somewhat greater. T 253-254.

64.

It would not have been a futile gesture for Mr. Hayes and Mr. Brown to have expressed their interest in a supervisory position.

65.

Based on the foregoing facts (Findings of Fact No. 55-62), the court concludes that Mr. Brown and Mr. Hayes have not borne the burden of persuasion to show that they were passed over for supervisory promotions under circumstances giving rise to an inference of discrimination.

66.

Even if Mr. Brown and Mr. Hayes were considered to have raised an inference of discrimination, the record contains evidence of Gulf's nondiscriminatory reason for

not appointing them. Gulf did not know that they wished to be appointed.

67.

The record as a whole supports the conclusion that nondiscriminatory factors rather than discriminatory ones account for Mr. Brown's and Mr. Hayes' failure to be appointed supervisors. See Findings of Fact No. 55-63.

68.

Mr. Rodney Tizeno expressed an interest in the job of planner, in 1976 or 1977. PX 93, para. 3. He testified by affidavit that in 1981, a Mr. Charles Chesser received a temporary promotion to the planner job.

69.

At the time of his promotion, Mr. Chesser had less plant seniority that Mr. Tizeno. Class Certification Hearing, JDX-80. He also had less plant seniority than 126 other No. 1 Pipefitters, 108 of whom were white.

Eighty of these 108 white No. 1 Pipefitters also had greater plant seniority than Mr. Tizeno.

70.

There is no evidence that Mr. Tizeno was otherwise more qualified than Mr. Chesser.

71.

The fact that Mr. Chesser was promoted in preference to over 100 more senior eligible individuals, the majority of whom were white, does not raise an inference that his promotion constituted racial discrimination against Mr. Tizeno, who was not among the most senior of the eligible persons.

72.

The record as a whole does not support an inference that racial discrimination was likelier than not the reason for Mr. Chesser's temporary promotion to the planner job.

73.

Mr. Tizeno also testified that he expressed an interest in a supervisory position, sometime in 1979. PX 93, para. 7. At that time, Mr. Tizeno was one of the most junior No. 1 Pipefitters, JDX-76. There were 138 No. 1 Pipefitters, 112 of whom had greater plant seniority than Mr. Tizeno. Of this 112, 104 were either white or Hispanic.

74.

That same year, 4 blacks were appointed to supervisory positions. In light of the fact that Gulf did not discriminate in making supervisory selections and in fact practiced affirmative action in making promotions to supervisor (see Findings of Fact No. 61-62), the facts do not convince the court that Mr. Tizeno's nonselection to a supervisory position was more likely than not motivated by racial discrimination.

75.

Any Conclusion of Law that is properly a Finding of Fact is incorporated herein as a Finding of Fact.

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of this action under Section 706 of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000-e *et seq*. and under the Civil Rights Act of 1964, 42 U.S.C. § 1981.

II.

The court has jurisdiction of defendants Gulf and the OCAW International and its Local 4-23 based on the June, 1967 charges filed with the EEOC.

III.

The court has jurisdiction of the specific issues remanded to it by the United States Court of Appeals for the Fifth Circuit opinion dated March 22, 1988.

IV.

Using the four factors enunciated in *James v. Stockham Valves and Fittings Co.*, 559 F.2d 310, 351 (5th Cir. 1977) *cert. denied* 434 U.S. 1034, 98 S.Ct. 767 (1978), this court found the seniority system negotiated by Gulf and the OCAW to be *bona fide*. The Court of Appeals concluded that the seniority system at Gulf could not be found other than *bona fide* based solely on discrimination occurring before the effective date of Title VII. However, the Appeals Court remanded for consideration of whether Stipulation 29 to the 1967 Collective Bargaining Agreement evidenced purposeful discrimination. Establishment of purposeful discrimination is essential to plaintiffs' claim that the seniority system was not *bona fide* under Section 703(h). *Bernard v. Gulf Oil Corp.*, 841 F.2d 547, 561 (5th Cir. 1988), CA Opinion 35.

V.

The Appeals Court's language and the traditional analysis associated with claims of intentional discrimination indicate that Plaintiffs bear the burden of persuasion to show that Stipulation 29 was motivated by purposeful discrimination. The standards for proving intentional discrimination are those enunciated in *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973) and elaborated in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. at 716. The Plaintiff bears the burden of persuasion through the lawsuit. *Id.*; *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 256. When the case has been fully tried, as has the case at bar, the court may decide, in light of the evidence in the record, whether plaintiffs have proved intentional discrimination. *Aikens*, *supra* at 715.

VI.

The court holds that Plaintiffs have failed to prove that Stipulation 29 evidenced purposeful discrimination (see Findings of Fact No. 8 through 21). Therefore, the seniority system is *bona fide*, and actions that are part of that system are protected from challenge under an adverse impact theory by 42 U.S.C. § 2000-2(h) ("Section 703(h)"). *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982).

VII.

Stipulation 29 was part of the seniority system at Gulf; were it not, it could not be used to attack the *bona fides* of that system. Therefore, Gulf and the OCAW are entitled to judgment on the claim that Stipulation 29 was unlawful because it adversely affected blacks. *American Tobacco Co. v. Patterson*, *supra*.

IX.

The Court of Appeals found that Stipulation 29 had adverse impact on blacks. Therefore, if the seniority system were not *bona fide*, Gulf and the OCAW would be required to come forward with evidence that Stipulation 29 was justified by legitimate business reasons. *Watson v. Fort Worth Bank and Trust Co.*, 56 U.S.L.W. 4922 (June 30, 1988). The Court of Appeals characterized the adverse (or disparate) impact theory as requiring Gulf and the OCAW to prove, by a preponderance of the evidence, that legitimate business reasons justify the adoption of Stipulation 29, CA Opinion 31, 841 F.2d at 560. However, *Watson*, decided after the Appeals Court's opinion in the case at bar, indicates that Gulf and the OCAW bear a rather lighter evidentiary burden. Writing for a plurality of four out of eight justices, Justice O'Connor said of disparate impact theory,

> Although we have said that the employer has the burden of showing that any given requirement must have a manifest relationship to the employment in question . . . such a formulation should not be interpreted as implying that the burden of proof can be shifted to the defendant . . . . Thus, when a plaintiff has made out a prima facie case of disparate impact, and when the defendant has met its burden of *producing evidence that employment practices are based on legitimate business reasons*, the plaintiff must "show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship."

56 U.S.L.W. at 4927 (emphasis added). Although the plurality opinion is not controlling, it is entitled to great weight, and may under some circumstances carry dispositive force. *Planned Parenthood League of Mass., et al. v. Bellotti*, 641 F.2d 1006, 1010 n. 6, 1011 (1st Cir. 1981). Thus, if the seniority system were not *bona fide*, Gulf and the OCAW could successfully defend against the plaintiffs' claim of adverse impact by producing evidence of their legitimate business reasons for negotiating

Stipulation 29. If they do so, Plaintiffs can prevail only by showing that some other avenue was available to Gulf and the OCAW that served their legitimate business reasons equally well with less undesirable effect. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

X.

If Gulf and the OCAW were required to come forward with evidence that Stipulation 29 was justified by legitimate business reasons, they have done so. See Findings of Fact Nos. 11-13, 16.

XI.

Even if Gulf and the OCAW were required to prove that Stipulation 29 was justified by legitimate business reasons, they have done so by a preponderance of the evidence. See Findings of Fact Nos. 3-13, 16.

XII.

Plaintiffs have failed to show that any alternative method was available to accomplish the same legitimate

business objectives. Therefore, Gulf and the OCAW are entitled to judgment on the claim that Stipulation 29 had unlawful adverse impact on blacks.

XIII.

This court previously found, and the Court of Appeals accepted, that the New Tests adversely impacted blacks, although the absolute impact was small. Therefore, Gulf must produce evidence to show that the New Tests are job related. In its earlier opinion, this court held that Gulf had shown, by a preponderance of the evidence, that the New Tests were valid.

XIV.

The Court of Appeals endorsed the method used by Gulf in the 1983 Validation Study conducted by RBH. 841 F.2d at 566. However, the Appeals Court remanded for further evidence as to why the results of that study supported the validity of the New Tests. It directed this court to "take into consideration the relationship between

tests scores and job performance in all of the departments which comprise the basis for plaintiffs' complaint," and "specifically set forth the reasons that justify its determination, including any correlation coefficients upon which it relies and an explanation for its reliance." 841 F.2d at 567.

XV.

The Court of Appeals held that Gulf could prevail by showing, through professionally acceptable methods, that the New Tests were "predictive of or significantly correlated with important elements of work behavior that comprise or are relevant to the job or jobs for which candidates are being evaluated." CA Opinion 43, 841 F.2d at 562. Thus, Gulf can establish validity by evidence of a significant correlation, or by other evidence that the tests are predictive of important elements of work behavior.

XVI.

The Court of Appeals appeared to assume that Gulf bore the burden of persuasion as to the validity of the tests. However, Justice O'Connor's plurality opinion in the case of *Watson v. Fort Worth Bank and Trust Co.*, *supra*, requires only that Gulf come forward with evidence of job relatedness. See Conclusion of Law No. IX.

XVII.

Justice Blackmun, who concurred in the majority portion of Justice O'Connor's opinion, dissented to the plurality portion. Writing for himself and two other justices, he maintained that once adverse impact is shown, the defendant bears the burden of proof to show that the adverse impact is justified by legitimate business reasons. 56 U.S.L.W. at 4928. Justice Blackmun acknowledged, however, that job-relatedness cannot always be established with mathematical certainty, 56 U.S.L.W. at 4930, and that a variety of methods are available for establishing the link

between selection processes and job performance, including the results of studies, the presentation of expert testimony, and prior successful experience. Justice Blackmun indicated that a trial Court is required to look to different forms of evidence to assess an employer's claim of business necessity, and that "common sense surely plays a part in this assessment." *Id.* The court holds that no single correlation coefficient, such as .30, is essential to a showing of job-relatedness.

XVIII.

All authorities agree that Gulf may satisfy its burden with professionally acceptable evidence that the New Tests are either significantly correlated with, or that they are predictive of, significant elements of the jobs selected for. All authorities further agree that there is no rigid rule governing the form of that evidence, and that the district court need not shed its common sense in the process of evaluating the evidence. Under the O'Connor

plurality, under the Blackmun view, the evidence must amount to a preponderance. The court holds that the O'Connor plurality is entitled to great weight, *Planned Parenthood League of Mass., et al. v. Bellotti*, *supra*, and that Gulf bears only the burden of producing evidence that the New Tests are job-related.

XIX.

The court holds that Gulf has met its burden of producing evidence that the New Tests are job-related. Although correlations were not reported for each of the OCAW maintenance departments in which the tests were used, the jobs in these departments were shown to be similar to the two classifications for which significant correlations were reported. This analysis is not without precedent, see *Aquilera v. Cook Co. Police and Corrections Merit Board*, 582 F.Supp. 1053, 1057 (N.D. Ill. 1984). In *Aquilera*, the court held that a high school diploma requirement was valid for the job of correctional officer

because it was "comparable to" the job of police officer, and the high school diploma requirement had been upheld for police officers. The Fifth Circuit cited this decision with approval in *David v. City of Dallas*, 777 F.2d 205, 213 n. 6 (5th Cir. 1985), *cert. denied*, 476 U.S. 1116 (1986).

XX.

The absolute impact of the New Tests was small. See Finding of Fact No. 21. The lesser the adverse impact of a test, the lesser will be the required showing of job relatedness. 29 C.F.R. § 1607.14(B)(6) (1987). If Gulf were required to show by a preponderance of the evidence that the New Tests were job-related for each of the OCAW departments involved in this litigation, it has done so.

XXI.

This court found, and the Court of Appeals accepted, that the Old Tests had adverse impact on blacks, although it was minimal in absolute terms.

Therefore, Gulf must produce evidence that the Old Tests were job-related. (See Conclusion of Law No. XVII.)

XXII.

Gulf introduced a "path analysis" to show that the Old Tests predicted job performance. The logic of the path analysis is simple: the Old Tests are correlated with the New Tests, which means that the same people do well and the same people do poorly on them. To the extent that they "select" applicants, they will "select" essentially the same people. If the New Tests are job-related, then the Old Tests are job-related as well. Path analysis is a more careful and precise way of carrying out an analysis that has been approved by the Fifth Circuit in *Davis v. City of Dallas*, 777 F.2d 205 (5th Cir. 1985), *cert. denied*, 476 U.S. 1116 (1986). *Davis* involved the question of whether 45 hours of college credit was a valid requirement for the job of police officer. It does not appear that a high school diploma requirement for police

officers has ever been formally validated; however, it has been widely approved by the courts. In *Davis*, an expert testified that a two-year college degree now is "not unlike a high school diploma was twenty years ago." *Id.* at 221. Therefore, the Court concluded, the requirement that police recruits have two years of college was unlawful. Gulf has shown more than that the Old Tests are not "unlike" the New Tests; it has shown that the two tests are extremely similar. Thus, if the New Tests are valid, the Old Tests are also valid. Based on the path analysis and the opinions of Gulf's experts, the court concludes that Gulf has met its burden to produce evidence that the Old Tests were job-related.

XXIII.

Because Gulf's evidence on the job-relatedness of the Old Tests was uncontroverted, it amounts to a preponderance. Furthermore, where adverse impact is slight, a lesser showing of job-relatedness is needed. 29

C.F.R. § 1607.14(B)(6) (1987). Gulf has shown by a preponderance of the evidence that the Old Tests were job-related.

XXIV.

In its earlier opinion, this court found that Messrs. Hayes, Brown and Tizeno had failed to make a *prima facie* case of intentional discrimination by virtue of the fact that they were not promoted to supervisor. This opinion was based on the fact that Messrs. Hayes and Brown had failed to apply for supervisory promotions, and Mr. Tizeno had failed to show himself more qualified than the individual who was appointed. The Court of Appeals held that these were insufficient reasons to find that the plaintiff had failed to make a *prima facie* case, and directed this court to reconsider the claims of Messrs. Hayes, Brown and Tizeno.

XXV.

In order to establish a *prima facie* case of intentional racial discrimination, a plaintiff must adduce facts sufficient to raise an inference that discrimination was a likely motive for the defendant's actions. One method for doing this, according to the Court of Appeals, is to show, by a preponderance of the evidence, that the plaintiff (a) belongs to a group protected by Title VII; (b) that he was qualified for the job; (c) that he was not promoted; and (d) the employer promoted one not in the Plaintiff's protected class.

XXVI.

The *McDonnell-Douglas* formula is not a rigid one, but will necessarily vary with the facts of each individual case. 411 U.S. at 802, n. 13. Its utility is that it "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on consideration of impermissible factors."

Furnco Construction Co. v. Waters, 438 U.S. 567, 577 (1978). The utility of the formula is that it "eliminates the most common nondiscriminatory reasons for the plaintiff's nonselection." *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 253-254. However, in a context where the defendant does not know that the Plaintiff is interested in a particular job, no inference of discrimination can be drawn from the defendant's failure to select the plaintiff. What is more, it is impossible for the defendant to offer its legitimate business reasons for the plaintiff's nonselection. Without any action on the plaintiff's part that informs the defendant of his interest, it is impossible to identify the point in time when the defendant selected someone else in preference to the plaintiff. The court concludes that the *McDonnell-Douglas* formula is inapposite to the claims of Messrs. Hayes and Brown.

XXVII.

An alternative formulation is found in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253(1981). In order to establish a *prima facie* case of intentional racial discrimination, a plaintiff must adduce facts sufficient to raise an inference of discrimination. In a failure-to-promote case, the Supreme Court has stated that the plaintiff must prove that "she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." *Id.* The court holds that this formulation is more suited to analyzing the claims of Messrs. Hayes and Brown than is the formula in *McDonnell-Douglas v Green*, *supra*.

XXVIII.

If plaintiff makes out a *prima facie* case the employer must produce "evidence that the plaintiff was

rejected, or someone else was preferred, for legitimate, non-discriminatory reasons . . . ." *Id.* at 253-254. If the employer meets this burden, "the presumption of discrimination 'drops from the case' and the District Court is in a position to decide whether the particular employment decision at issue was made on the basis of race." CA Opinion 59, 841 F.2d at 570. In meeting its burden of production, Gulf does not have to prove what its reasons were; it simply must produce evidence that "raises a genuine issue of fact as to whether it discriminated" against Hayes and Brown. *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 254-255. If Gulf does so, then the court must decide whether Hayes and Brown have shown, by a preponderance of the evidence, that discrimination is the likeliest explanation for the fact that they were not promoted to supervisory positions.

XXIX.

Based on the *Burdine* formulation (see Conclusion of Law No. XXVII), Hayes and Brown have failed to make a *prima facie* case. The fact that they were not promoted, when there was a known method if expressing an interest in promotion and some people were not interested, and when blacks were being promoted in numbers proportional to their representation in the relevant eligibility pools, do not amount to "circumstances giving rise to an inference of unlawful discrimination".

XXX.

Based on use of the *McDonnell-Douglas* formula, Hayes and Brown could be said to have made a *prima facie* case, although a marginal one. Each is black, each failed to become a supervisor, and some whites did become supervisors. The evidence that Hayes and Brown were qualified consists solely of their self-evaluation. It is doubtful whether such evidence is sufficient to carry their

burden of persuasion. However, there is no evidence in the record to the effect that they were unqualified.

XXXI.

Assuming, *arguendo*, that Messrs. Hayes and Brown made a *prima facie* case of discrimination, Gulf produced evidence of its legitimate, nondiscriminatory reason for not selecting them. Gulf showed that neither Mr. Hayes or Mr. Brown made known to anyone in authority that they were interested in becoming supervisors. There has been no showing that such a request would be futile, which is a "difficult task". *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 364 (1977). The presence of blacks, even in small numbers, has defeated an employee's effort to show that application of supervisory promotions that went to blacks from 1967 through 1982, Messrs. Hayes and Brown cannot show that it would have been a futile gesture for them to express an interest in such a promotion. The record does not contain evidence from

which the court could infer that everyone at the Port Arthur Refinery wanted to be a supervisor, thereby creating the inference that Gulf knew of Mr. Hayes' and Mr. Brown's interest despite their failure to mention it, nor is there evidence that whites were promoted without making their interest known to anyone. Thus, Gulf met its burden to produce evidence of a legitimate, non-discriminatory reason for the nonpromotion of Hayes and Brown to supervisory positions; it did not know of their interest. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

XXXII.

The record as a whole does not support a conclusion that discrimination likelier than not was a reason for the nonselection of Hayes and Brown for supervisory positions. *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). See Findings of Fact No. 52 through 62.

XXXIII.

Mr. Tizeno claimed that he had not been promoted to the position of Planner nor to a permanent supervisory job. In its prior opinion this court found that he had not made a *prima facie* case of discrimination because he had not shown himself more qualified than the person who was promoted. The Court of Appeals held that a plaintiff need not make a showing in order to establish a *prima facie* case.

XXXIV.

Mr. Tizeno established that he is a black, that he asked to be considered for the position of planner and of supervisor, and that he was not promoted to either position. He testified that Mr. Charles Chesser, a white, was given a temporary promotion to the planner job, and there is no dispute that some whites were made supervisors. Thus, Mr. Tizeno can be said to have established a *prima facie* case, although a very weak one.

XXXV.

Gulf introduced evidence that, at the time he requested the planner's job Mr. Tizeno had only been a No. 1 Pipefitter for two years and that he was one of the most junior of the No. 1 Pipefitters. Mr. Chesser's promotion occurred some four years after Mr. Tizeno expressed interest in the job. Mr. Chesser was promoted, not only in preference to Mr. Tizeno, but in preference to 80 non-blacks who were senior to both men. This evidence is sufficient to meet Gulf's burden of producing "evidence sufficient to raise a fact question as to whether it discriminated" against Mr. Tizeno. *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 254-255.

XXXVI.

The record as a whole does not support the conclusion that discrimination more likely than not motivated Gulf's selection of Mr. Chesser in preference to Mr. Tizeno for the temporary promotion to the job of

planner. *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). See Findings of Fact No. 67 through 69.

XXXVII.

Mr. Tizeno also alleged that he had requested a promotion to the position of permanent supervisor, but that he had not been selected. Mr. Tizeno showed that he is black and that he was not promoted. His qualifications for the job rest on his own self evaluation; although it is entitled to little weight, there is no evidence that he was unqualified. It is not clear that a white was promoted to the job he sought, because both backs and whites were promoted to supervisor. However, the Court of Appeals remarked that "(a)lthough the evidence is a slight, arguably Tizeno met his burden" to make a *prima facie* case., CA Opinion 60; 841 F.2d at 570.

XXXVIII.

Gulf produced evidence that, at the time he expressed interest in a promotion, Mr. Tizeno was among the least senior No. 1 Pipefitters. Assuming *arguendo* that Mr. Tizeno made a *prima facie* case, Gulf produced evidence sufficient to raise a fact question as to whether it discriminated against him. *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 254-255.

XXXIX.

The record as a whole does not support the conclusion that discrimination more likely than not motivated Gulf's nonselection of Mr. Tizeno for a permanent promotion to the job of planner. *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). See Findings of Fact No. 71 through 72.

XXXX.

Any Finding of Fact that is properly a Conclusion of Law is incorporated herein as a Conclusion of Law.

SIGNED AND ENTERED this 1st day of September, 1988.

/s/ Joe J. Fisher

UNITED STATES DISTRICT JUDGE

Wesley P. BERNARD, et al.

v.

GULF OIL CORPORATION, et al.

Civ. A. No. B-76-183-CA.

United States District Court,
E.D. Texas,
Beaumont Division.

Sept. 18, 1986.

MEMORANDUM OPINION

JOE J. FISHER, District Judge.

Plaintiffs are six present and retired black employees at Gulf Oil Corporation's Port Arthur, Texas, refinery. Plaintiffs, who are also present or former members of the Oil, Chemical and Atomic Worker's Union, Local 4-23 ("OCAW"), allege that Gulf and the OCAW have engaged in a broad range of employment discrimination against black employees. Plaintiffs seek

declaratory, injunctive, and monetary relief, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. and Section 16 of the Enforcement Act of 1870, 42 U.S.C. § 1981.[1]

A trial was held in April 1984 on the class-wide liability of Gulf and the OCAW. The class-wide claims are predicated upon two fundamental theories: that Gulf and the OCAW committed pre- and post-Title VII violations (1) by formulating and maintaining a non-bona fide seniority system and (2) by administering non-job-

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[1] The action was initially filed in May 1976. This court dismissed Plaintiffs' Title VII claims on procedural grounds and granted Defendants summary judgment on Plaintiffs' § 1981 claims. The Court of Appeals for the Fifth Circuit reversed the judgment and remanded the case for trial. *Bernard v. Gulf Oil Co.*, 619 F.2d 459 (en banc) (5th Cir. 1980), *aff'd*, 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981).

This Court, by Order dated April 2, 1984, certified the class of affected employees to include only black persons who were employed at Gulf's Port Arthur refinery on or after December 26, 1966, who were members of the OCAW and who had not executed releases for back pay pursuant to a 1976 Conciliation Agreement between Gulf and the Equal Employment Opportunity Commission (EEOC).

related promotion tests and attendance policies that adversely affected blacks.

The individual claims of the named Plaintiffs were also before the Court. They consisted primarily of allegations that Gulf intentionally discriminated against Plaintiffs by not promoting them to supervisory positions and by disqualifying them from other positions.

Both the seniority system and the testing requirements changed during the years in issue. Because the facts are complex, they are addressed in chronological order; first, as to the seniority system and second, as to the test-based promotion program. The individual claims are addressed last.

I. CLASS CLAIMS

A. *The Seniority System*

(1) *Pre-1963 Discrimination*

Prior to 1963, there existed two OCAW locals at Gulf: Local 245, which represented only black employees, and Local 23, which represented only white employees. At the insistence of the international union, these locals merged in 1963, 2 years before the effective date of Title VII.

Prior to 1967, Gulf's workforce was divided into two major divisions: the Craft Division and the Labor Division. The Craft Division had 14 skilled occupational sections. Each section had its own "line of progression" (LOP). For example, at the lowest end of the boilermaker section is the helper; at the highest end, the number one boilermaker. The higher positions were functionally related to the lower ones and presupposed

competency and efficiency in the lower jobs. The Labor Division was composed of men who did work requiring less skill. By 1954, most craft sections had laborers assigned to them. The Labor Division also had separate lines of progressions.

Prior to 1956, all the labor jobs were occupied by blacks, and no laborer was permitted to enter into the Craft Division. The Craft Division was staffed entirely by whites. In both divisions, new employees started at the lowest level positions. That occupational segregation was partially the result of a gentlemen's agreement between the black and white locals to not bid on each others' jobs. The OCAW negotiating committees at that time were made up of both black and white members. The agreement was not imposed by Gulf nor was it incorporated into any of the formal labor agreements. The local memberships apparently viewed the agreement as a means by which to protect their respective positions.

In 1956, the lowest level Labor Division job became the entry-level position for employees of every race.[2]

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[2] Between the years 1956 and 1963, a high school diploma or its equivalent was also required before one could transfer between labor and craft. Plaintiffs argue that the diploma requirement was not job-related and was based solely upon Defendants' unsubstantiated belief that this level of education was essential for employees who might advance into more complex positions. Plaintiffs also argue that incumbent craft-line whites were not required to obtain the diploma and that almost half of the incumbents did not have one.

Plaintiffs' comparison between entering labor employees and incumbent craft-line personnel is inapposite. Laborers seeking entry into the crafts are not similarly situated to incumbent craft-line employees. The diploma requirement was applied equally to those who were similarly situated, namely, blacks and whites seeking to enter the crafts. The diploma requirement was a new feature of Gulf's seniority system but it was not an essential feature. That requirement was eliminated in 1963. Plaintiffs introduced no statistical evidence to suggest that the diploma requirement made a significant difference in the number of blacks who would have been admitted into a craft position but for that requirement.

Also, employees seeking to transfer between 1956 and 1963 were required to pass a battery of tests. The battery included: (1) the Bennett Mechanical Comprehension Test; (2) the Doppelt Numerical Personnel Tests for Industries; and (3) The Atis Quick Scoring Mental Ability Test. The same tests were also administered to new hires beginning in 1956 (when the laborer position became the entry-level position for all employees). The testing requirements applied equally to blacks and whites; except that a post-1956 hiree-transferee did not have to take the test again, since one had already taken it to get hired. Plaintiffs argue that as a result of the post-1956 exemption, the only employees required to take the tests to transfer were blacks (since all whites who worked in labor took the test to get hired).

There is no merit to Plaintiffs' assertion. Both blacks and whites had to take the tests. The fact that they took it at different

At the same time, seniority provisions were established for transfer between the Labor and Craft Divisions. These provisions covered both black and white laborers who sought promotion to the craft jobs. A labor transferee would start at the lowest job in a Craft Division section. (Technically, such a transferee would first bid into the Mechanical Helper Pool before entering a craft). A laborer could not transfer into an upper level craft position. Vacancies in those jobs were first offered to people in a lower level job in the same section. Such vacancies were posted for plant-wide bidding (i.e., outside that section) only when other Craft Division workers had more craft seniority than those bidding from the same section.

Between 1956 and 1963, the period during which the system was in use, a laborer who successfully bid into

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times is irrelevant.

a craft-line entry position was assigned dual seniority: divisional seniority and plant seniority. Regardless of how much plant seniority a transferee may have accumulated previously, he started in the craft (for purposes of craft-line promotions and demotions) with only one days' divisional seniority. One's plant seniority came into play if workforce reductions were required. That is, a transferee could use his plant seniority to return to labor and thereby avoid lay off. When a transferee was required to return to labor, his Labor Division seniority would then determine promotions and demotions in that division. After 1963, the divisional seniority system was eliminated and plant seniority became the basis for all promotions, demotions, and lay offs.

Plaintiffs allege that the 1956-1963 one-day divisional seniority rule was discriminatory. The discriminatory results were specifically felt when workforce reductions occurred between 1959 and 1961, at which time

newly arrived craft-line blacks (and whites) were demoted while pre-1956 craft-line whites with less plant seniority were not.

Plaintiffs argue that the one-day divisional seniority rule, in conjunction with the pre-1956 assignment of blacks to Labor and whites to Craft, causally operated to stunt blacks' advancement into the entry-and upper-level craft positions. Plaintiffs conclude that Gulf's seniority system was therefore non-bona fide under Title VII and that both pre- and post-Act discriminatees ought to be awarded constructive seniority and back pay.

Is The Seniority System Bona Fide?

If Gulf and the OCAW can prove that their seniority system is bona fide, then they are immune to charges of pre-Title VII employment discrimination. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 353-55, 97 S.Ct. 1843, 1863-65, 52 L.Ed.2d 396 (1977). The Court has held that to be bona fide, a pre-

Title VII seniority system must not have been designed with the intent to discriminate. *Id.* The Court also held that a bona fide departmental seniority system does not violate Title VII merely because it may perpetuate into the post-Act period the effects of pre-Act discrimination. *Id.* at 352-53, 97 S.Ct. at 1863-64. Moreover, a necessary precondition for maintenance of a post-Act claim is the timely filing of a charge with the EEOC. See *United States v. Evans*, 431 U.S. 553, 558, 97 S.Ct. 1885, 1889, 52 L.Ed.2d 571 (1977). Thus, if Plaintiffs cannot prove that Gulf operated a non-bona fide seniority system, they must prove that Defendants engaged in acts of discrimination (whether perpetuated effects or entirely independent) occurring on or after December 26, 1966, which is 180 days prior to the date on which Plaintiffs filed their charges of employment discrimination with the EEOC.

Applying *Teamsters*, the Fifth Circuit has phrased the bona fide inquiry this way: Has there been purposeful

discrimination in connection with the establishment or continuation of a seniority system which will render that system mala fide? *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 351 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978). In arriving at an answer to that question, four factors are evaluated in the context of the totality of circumstances:

(1) whether the seniority system operates to discourage all employees equally from transferring between seniority units,

(2) whether the seniority units are in the same or separate bargaining units and, if separate, whether that structure is rational and industry-wide,

(3) whether the seniority system had its genesis in racial discrimination, and

(4) whether the seniority system was negotiated and maintained free from any illegal purpose. Id. at 352.

As will be seen, under *James* Gulf's seniority system is bona fide and thus does not violate Title VII.

(i) Equal Transference Between Seniority Units

Plaintiffs argue that the one-day seniority rule was designed to negatively affect blacks and render worthless any plant seniority that they may have accumulated. The Court disagrees.

The one-day rule was facially and operationally neutral: it applied equally to whites and blacks. The purpose and effect of the rule was to maintain the most qualified persons in their respective technical Craft Division positions, as well as to protect the integrity of the vertical promotion system and the legitimate expectations of those already in the craft-lines.

Because a transferee did not forfeit his plant or labor seniority upon transferring into the Craft Division, the rule could not possibly discourage a black laborer

from transferring. A transferee could still use plant seniority to avoid layoff and labor seniority in the event he was demoted. There is no evidence that a transferee was subjected to a wage cut upon entering the Craft Division. See *Pettway v. American* Cast Iron Pipe Co., 494 F.2d 211, 223-24 (5th Cir. 1974) (fact that transferee endured a wage cut highly detrimental to bona fides of seniority system).

The elimination of the one-day rule pre-dated the enactment of Title VII. By the effective date of that statute, Gulf and the OCAW had opened up the craft lines for bids based on plant-wide seniority. Plant-wide seniority was also used to determine all promotions and demotions within the craft lines. That is precisely what Plaintiffs contend is the fairest system.

(ii) Same or Separate Bargaining Unit

There is no "same or separate bargaining unit" controversy in this case. Therefore, *James* factor number two is not in issue.

(iii) Genesis of Seniority Unit

Plaintiffs contend that Gulf's seniority system had its genesis in racial discrimination. Widespread societal discrimination existed in the South in 1943, the year in which Gulf's seniority system was negotiated. The fact that blacks were initially relegated to the laborer jobs while whites entered the craft positions is proof, assert Plaintiffs, that Gulf specifically adapted its seniority system to the prevailing social prejudices of that time. Plaintiffs argue that to the extent that the seniority system was patterned upon the existing threads of social bigotry, that system preserved and perpetuated that discrimination.

Plaintiffs' allegations that Gulf's seniority system had its genesis in racial *segregation* is not the legal

equivalent of saying that the seniority system had its genesis in racial *discrimination*. *See Carroll v. United Steelworkers of America*, 498 F. Supp. 976, 986 (D. Md.), *aff'd*, 639 F.2d 778 (4th Cir. 1980). The passive co-existence of union and societal segregation is not enough to render a seniority system mala fide. Rather, Plaintiffs must show that the seniority system, as an insular and structurally independent entity, was designed to effectuate an intent to discriminate on the basis of race or to lock in place blacks previously discriminated against. *Teamsters*, 431 U.S. at 353-55, 97 S.Ct. at 1863-65.

The *Carroll* court looked for objective indicia of intent. For example, the court noted that the purpose of the system was to erect objective standards--most notably, seniority--by which decisions relating to employee promotion, demotion, layoff, and recall were made. *Carroll*, 498 F. Supp. at 986. This kind of seniority system

was widely adopted nationwide by major companies, without regard to the racial composition of the particular workforce. Id. The bargaining policies of the union were not racially premised. *Id.*

The malapportionment of blacks and whites at Gulf resulted from two sources other than the seniority system. First, there was the unions' gentlemen's agreement to not compete. Without question, the self-imposition of such occupational restraints constituted a joint acquiescence in the invidious predilections of a segregationist society. However, that accommodation, reached by the union locals, was independent of any action taken by Gulf or the OCAW International. The discriminatory aspects of that agreement were not incorporated into any of the formal labor agreements between the Company and the Union. That agreement had no bearing whatsoever on the conceptual integrity of the system. That is, the system was not structured to discriminate; nor were the

discriminatory consequences connected in any way with the system *per se*. Those consequences were in part superimposed by the workers themselves upon an otherwise neutral seniority system.

The second factor contributing to the segregationist distribution of blacks and whites was purely social. Blacks constituted the great bulk of the laborer force in the South during that period. The relegation of blacks to labor was a passive adaptation of racially discriminatory social practices to the seniority system and not *vice versa*. Like the gentlemen's agreement, that practice had no bearing upon the theoretical or structural components of the seniority system. The presence of divisive social prejudice does not, alone, constitute a proper predicate upon which to impose restorative legal remedies which will operate at the expense of innocent people. *See Wygant v. Jackson Board of Education*, ___ U.S. ____, 106 S.Ct., 1842, 1848, 90 L.Ed.2d 260 (1986) ("[A]s the basis

for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over expansive") (emphasis in original).

Society's past racial misconceptions and the gentlemen's agreement jointly operated to consign blacks to inferior positions at Gulf. However, neither of these wrongs are connected in anyway with the seniority system.

Gulf's seniority system met other criteria of legitimacy. In both Labor and Craft, promotions, demotions, and layoffs were objectively determined by seniority. The seniority system was typical of that used in the industry at plants predominately black and those predominately white. There is no evidence that the OCAW International's bargaining policies were racially biased, or that the OCAW negotiated along racial lines.

The Court cannot infer that Gulf's seniority system was motivated by discriminatory prejudices or maintained as a construct by which to perpetuate racial imbalances.

Hence, under *James* factor number three, Gulf's seniority system did not have its genesis in racial discrimination.

(iv) Illegality of the Seniority System

There is no evidence that Gulf or the OCAW engaged in any illegal activity with respect to the formulation or maintenance of the seniority system.

Employing the *James* test, the Court finds that Gulf's seniority system was bona fide. The plant-wide seniority system was instituted prior to the enactment of Title VII; along with job posting and job bidding. See *James*, 559 F.2d at 352-53. The major negative impact from the use of divisional seniority occurred during the 1959-1961 workforce reductions, well before the effective date of Title VII. Whites were also victims of the demotions and loss of rank.

Gulf and the OCAW had substantially eradicated the imperfections associated with the pre-Title VII system in other ways. For example, Gulf established night school

programs in 1965 and 1966 to assist those in the lower job classifications to advance. Gulf paid the employee's tuition and expenses, as well as $2.50 per hour to attend. A number of other affirmative action programs were also established. For these reasons, the Court finds that there were no lingering discriminatory effects subsequent to the December 26, 1966 cut-off date.

(2) Post-Title VII Discrimination: Stipulation 29

In 1967, Gulf and the OCAW negotiated Stipulation 29. Stipulation 29 simplified the complex craft promotion lines. Under Stipulation 29, mechanical trainee became the entry-level position for all crafts. Labor Division employees could bid directly into the craft-trainee position without first bidding into the Mechanical Helper Pool. Craft Division incumbents whose jobs were being eliminated because of the simplification program were administered a simple reading and writing test (out of 204

persons taking the test, one failed). Upon passing the test, the displaced employees were reclassified as mechanical trainees. Stipulation 29 applied equally to blacks and whites.

Plaintiffs argue that Stipulation 29 constituted a separate violation of Title VII and § 1981. Although blacks and whites were facially treated equally under the stipulation, Plaintiffs state that the overwhelming majority of employees who benefitted were white. Plaintiffs point again to blacks who earlier had returned to labor due to the workforce reductions as the prime example of those who did not benefit under the stipulation. Most of the blacks excluded from benefitting under the stipulation had more plant seniority, say Plaintiffs, than the craft-line whites who took the simple test and were reclassified as mechanical trainees. Plaintiffs argue that by favoring whites not demoted to labor under the 1956-1963 divisional seniority scheme, Stipulation 29 effectively

diluted their seniority rights by making it more difficult for them to bypass whites who, with less plant seniority, but more Craft Division seniority, now occupied higher Craft Division positions.

Plaintiffs admit that the Stipulation 29 test did not have an adverse impact on them. Indeed, of the 204 senior employees who took the Stipulation 29 test, only one failed. Most importantly, those same employees would have reached the mechanical trainee program first under the old bona fide system.

Moreover, under a 1971 conciliation agreement, between Gulf and the Government, blacks who had been demoted to the Labor Division during the workforce reductions, and were thus absent from the Craft Division when Stipulation 29 was implemented, were offered promotions to the number one positions in their prior crafts at competitive rates of pay. For these reasons,

Stipulation 29 does not constitute a separate Title VII or § 1981 violation.

B. *The Craft Training Tests*

A successful bidder had to pass examinations before transferring into a craft-line position. The same tests were administered for each craft line. The "Old Tests" were used to screen bidders between 1947 and 1971; and the "New Tests" were used to screen bidders after 1971.[3]

Plaintiffs third amended complaint only alleges that the OCAW and the Trade Unions "agreed to, acquiesced

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[3] The Old Tests consisted of six separate tests: (A) Test of Reading Comprehension; (B) Test of Arithmetic Fundamentals; (C) Wonderlic Personnel Test; (D) Mechanical Aptitudes Test; (E) Mechanical Insight Test; (F) A Lee-Clark Arithmetic Test. (These tests were apparently administered in addition to the 1956-1963 battery of tests). See footnote 2, *supra*.

The New Tests consisted of four parts: (A) Bennett Mechanical Comprehension Test; (B) Test of Chemical Comprehension; (C) Arithmetic Test; (D) Test Learning Ability. After 1971, these tests were also used for the hiring of new employees. Thus, any employee hired after 1971 was not required to take any additional tests to enter a craft.

in, or otherwise condoned the unlawful employment practices [of Gulf, as described in the complaint]." It does not allege that the Trade Unions independently discriminated against OCAW members. No cut-off scores were used in scoring the new tests. However, those achieving high scores were selected, *pari passu*, over those achieving extremely low scores.

Plaintiffs' statistics show that 82.5% of whites who took the Old Tests between January 1969 and March 1971 ultimately passed. Only 42.8% of blacks who took the same tests during that period ultimately passed. Between 1971 and 1980, 97.7% of the whites who took the New Tests passed them, while only 66% of the blacks who took those tests passed.

Under the "80% rule," Plaintiffs' statistics demonstrate adverse impact under both sets of tests because the proportion of blacks passing the tests is less than 80% of the proportion of whites passing the tests.

See 29 C.F.R. 1607.4(D) (1981). Therefore, Defendant must show that the employment tests are job-related.

Are The Tests Job-Related?

In *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971), the Supreme Court held that Title VII forbids the use of tests or other employment selection criteria that have the effect of excluding blacks at substantially higher rates than whites, absent a showing that the test or employment selection criteria are job related. If, as in this case, a test is shown to have a discriminatory impact, the employer must, by professionally accepted methods, prove that the test is "predictive of or significantly correlated with important elements of work behavior that comprise or are relevant to the job or jobs for which candidates are being evaluated." *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1280 (9th Cir. 1981), *cert.* denied, 455 U.S. 1021, 102 S.Ct. 1719, 72 L.Ed.2d 140 (1982).

A criteria validation study, which has been described by the Fifth Circuit as the "most accurate way to validate an employment test," *United States v. Georgia Power Co.*, 474 F.2d 906, 912 (5th Cir. 1973), was conducted by Gulf on the New Tests in 1983.[4] Plaintiffs only real objection to that study is predicated upon the "performance elements" used by Gulf.[5] These elements,

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[4] "Criterion-related" validity is established by showing that a test measures abilities which are component parts of jobs, mastery of which correlates with some measure of subsequent successful job performance.

So far as the Old Tests are concerned, Gulf was not required to validate them, for the reason that the Old Test were eliminated four years before *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975), imposed validation requirements; and seven years before The Equal Employment Opportunity Guidelines in Employee Selection Procedures instigated validated studies.

[5] The performance elements are: (1) learning new procedures quickly; (2 knowing when to get help; (3) handling several tasks at once; (4) understanding written instructions; (5) understanding oral instructions; (6) working without supervision; (7) paying attention to detail; (8) passing on instructions to others; (9) training other employees; (10) taking a systematic approach to work; (11) planning own work; (12) following standard operating procedures; (13) identifying problem situations quickly; (14) making accurate entries in logs or records; (15) completing assignments on time; (16) reading prints and diagrams; (17) setting priorities; (18) devising creative solutions; (19) remembering large amounts of detail; (20) making on-the-spot decisions; (21) communicating orally; (22) working with

say Plaintiffs, were for the most part general (or cognitive) ability elements completely unrelated to the actual duties employees had to perform. Plaintiffs argue that the validity study should have been predicated upon a list of actual duty elements.[6]

The Court finds that the criteria employed by Gulf to validate its New Tests reliably correlate with important elements that comprise or are relevant to the craft jobs. Plaintiffs' proposal that Gulf's tests be validated exclusively in accordance with performance dimensions that bear a one-to-one, rectilinear correlation with the actual duties of

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others.

[6] For example, the actual duty elements for a boilermaker, according to Plaintiffs, are: (1) using common hand-held tools; (2) following safety procedures; (3) working at heights over 4 feet; (5) working as a member of a team; (6) carrying out simple oral instructions; (7) working outside; (8) using handling and lifting devices; (9) repairing frames and platforms; (10) maintaining clean work area. The actual duty elements for the other craft positions are virtually the same as these and do not require separate mention.

the entry-level positions would require the use of tests that possess little if any predictive value.[7]

If these tests were being used to screen for the entry-level positions only, Plaintiffs' actual duty elements might be acceptable criteria. The entry-level positions at Gulf, however, are only the first steps in a highly formalized promotion scheme. Because promotions are based entirely upon seniority, advancement in a progression line is virtually assured. To be able to perform well in the advanced craft positions, the worker must be able to learn, or generalize, from his experience in the lower craft positions, and systematically apply those principles to the responsibilities of the higher jobs. That

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[7] There is some overlap in the criterion measures used by both parties (e.g., both suggest tests which measure one's ability to follow safety procedures; and understand oral instructions). To that extent, no controversy exists. some of Defendants' criteria, though not identical to Plaintiffs', are actual duty elements of the same species (e.g., the ability to make accurate entries in logs; and communicating orally). All in all, about one-half of Defendants' criteria are actual duty elements of the same cnaracter as Plaintiffs'. The other half constitute the cognitive ability elements and are the ones spawning the real controversy.

learning process requires certain cognitive abilities which are not situationally specific. Such innate abilities are not readily discoverable through the use of tests that measure only the abilities to perform the actual duties of the lowest craft job.

Since Gulf does not test for competency prior to promoting to a higher craft position, it is imperative that the company be reasonably certain at the time an employee enters the Craft Division that that employee is able, for reasons of safety and efficiency, to learn new skills and acquire new knowledge. *See Watkins v. Scott Paper Co.*, 530 F.2d 1159, 1168 (5th Cir.), *cert. denied*, 429 U.S. 861, 97 S.Ct. 163, 50 L.Ed.2d 139 (1976).

Also, most of Plaintiffs' actual duty elements involved abilities Plaintiffs should have already learned in the Labor Division. For example, each aspiring craftsman had already acquired the basic "hands-on" skills in the use of tools and materials. Testing only for such basic actual

duty skills could not predict which workers had potential for promotion up through the ranks. Quite simply, Gulf's overriding interest lay in ascertaining which of the equally experienced laborers had the greatest potential to train for new assignments. That approach, the use of employment tests to measure trainability irrespective of the test's possible relationship to actual performance on the job, was approved by the Supreme Court in *Washington v. Davis*, 426 U.S. 229, 250, 96 S.Ct. 2040, 2052, 48 L.Ed.2d 597 (1976).

The Court does not find the fact that Gulf used the same employment tests for all the craft-line destructive of the tests' validity. The tests were given to insure that an employee had the rudimentary skills necessary to be put into a training program. *See Ensley Branch of N.A.A.C.P. v. Seibels*, 616 F.2d 812, 822 (5th Cir. 1980), (tests used to screen out candidates not possessing minimum skills as opposed to ranking applicants according to scores are

justified). Although the mechanics of each job vary, the conceptual and intellectual competence required to perform each job is not significantly different. The carpenter, the pipefitter, the mechanic, and the other craftsmen all need the ability to conceptualize three-dimensional objects on the basis of two-dimensional drawings. Each must create physical objects in accordance with written or graphic specifications. All craftsmen must understand the geometrical relationships between the things they work with and be able to think in terms of area, volume, and length. Trainability based upon these and similar facets of each craft job being the transcendent criterion of eligibility, no unfairness results from the inter-craft use of these tests.

The Court, therefore, holds that the New Tests are job-related and immune to attack under Title VII.

C. *Discriminatory Application of S & A Policy*

Plaintiffs contend that Gulf discriminatorily applied its sickness and accident ("S & A") policy to blacks. The critical period is 1975 to 1980.

The policy at Gulf was that 80 or more S & A hours per year triggered an inspection of a senior bidder's record. If, in the opinion of the company, his record was unsatisfactory, he would be bypassed for the job.

Plaintiffs argue that during the years 1975-1980, 33.1% of all black bidders and 22.0% of all white bidders were rejected because of their unsatisfactory S & A records.

Gulf's S & A policy was applied equally to blacks and whites. Hence, even if Gulf's S & A policy resulted in adverse impact on blacks, its use is justified as good business practice under Title VII. *See Gilchrist v. Bolger*, 733 F.2d 1551, 1553 (11th Cir. 1984).

D. *Discriminatory Selection of Supervisors*

Gulf promoted employees to supervisory positions on both a temporary and permanent basis. Plaintiffs argue that between 1967 and 1982, blacks were selected as supervisors at rates inconsistent with their representation in the relevant eligibility pool; which, according to Plaintiffs, is the total number of hourly employees. Plaintiffs further contend that between 1965 and 1982, there were a total of 209 promotions to supervisor, with 22 or 10.5% going to blacks.

Gulf generally promoted upper level employees in the Craft Division to supervisor. Therefore, Gulf argued, the relevant eligibility pool was not the set of hourly employees, but rather those in the top jobs. During the period in issue, blacks constituted 11.35% of the top-job employees; 13.7% of the supervisory promotions went to blacks. In order to afford supervisory opportunities to blacks, Gulf argues, it promoted blacks with less seniority

faster than it did whites. Blacks were promoted to supervisor after they had averaged approximately 19 years at the plant and approximately 3 years in the No. 1 job. Whites had to wait longer--approximately 26 years at the plant and approximately 8-1/2 years in the No. 1 job.

The Court finds that Gulf's policy of promoting top-level employees to supervisor is justified. Not surprisingly or unreasonably, Gulf wanted to promote to supervisor only those employees who had substantial experience in the crafts they were to oversee. That is a universal business practice based upon the fact that such experienced supervisors are best qualified to promote efficiency and safety. *See Watkins*, 530 F.2d at 1168.

Moreover, although Gulf's standards of selection were unwritten and subjective, the Court finds no evidence that the standards were discriminatorily applied. *See Pouncy v. Prudential Ins. Co. of America*, 668 F.2d 795, 800-801 (5th Cir. 1982) (absent proof of discriminatory

intent, the use of subjective decision-making procedures is not per se discriminatory). The evidence presented does not demonstrate that Gulf intended to discriminate, or, from a statistical standpoint, that it did discriminate in promoting craftsmen to supervisory jobs.

E. *Union Liability*

A union breaches it duty of fair representation "only when [the] Union's conduct toward a member of a collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190, 87 S.Ct. 903, 916, 17 L.Ed.2d 842 (1967). The OCAW had responsibility for negotiating the plant seniority system and Stipulation 29. The Court has found that the seniority system was bona fide and that Stipulation 29 did not retard blacks' advancement into the craftlines. On those facts, the Court concludes that the Union did not breach

its duty of fair representation to the Plaintiffs, as to either the seniority system or Stipulation 29.[8]

Nor was there any credible evidence introduced that the Union did not properly pursue black members' grievances, as Plaintiffs allege. Indeed, Mr. Stelly, a former union representative and witness for Plaintiffs, testified that while he was Chairman of the Workman's Committee, everyone who asked for help received it. The Court therefore finds no fault with the Union.

II. INDIVIDUAL CLAIMS

The Court having found for Gulf and the OCAW on the classwide claims, Plaintiffs' individual claims based upon the same allegations are precluded. *Cooper v.*

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[8] In *Sinyard v. Foote & Davies*, 577 F.2d 943, 945-46 (5th Cir. 1978), the court held that Title VII does not impose an affirmative policing duty upon the international union for a discriminatory contract negotiated by one of its locals without the international's assistance or sanction. In our case, the gentlemen's agreement between the locals to not compete did not involve Gulf or the OCAW International. Indeed, the agreement was not so much an accord between the locals acting in their official capacities but rather a job-protecting accommodation reached among the rank and file themselves.

Federal Reserve Bank, 467 U.S. 867, 104 S.Ct. 2794, 2802, 81 L.Ed.2d 718 (1984). However, the named Plaintiffs may pursue their individual claims of intentional racial discrimination. *Id.*

In a Title VII cause of action for employment discrimination, the Plaintiff has the initial burden of establishing a prima facie case. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). In *McDonnell-Douglas*, the Court propounded a four-pronged test which, though schematized for application in discriminatory hiring cases, has been extended by this circuit, for example, to discriminatory termination cases. *Burdine v. Texas Department of Community Affairs*, 608 F.2d 563 (5th Cir. 1979), *vacated and remanded*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Since discriminatory failure

to promote is analogous to discriminatory termination, the *Burdine* test applies here.

The Plaintiff must prove that (1) he belongs to a group protected by Title VII, (2) he was qualified for the job, (3) he was not promoted, and (4) the employer promoted one not in Plaintiff's protected class. If Plaintiff makes out a prima facie case, the employer must produce "evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981). If the employer meets this burden, "the presumption of discrimination 'drops from the case,' and the District Court is in a position to decide . . . whether the particular employment decision at issue was made on the basis of race." *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984). As will be seen, none of the Plaintiffs' individual claims rise to the level of a

prima facie case of employment discrimination under *McDonnell Douglas*.

Elton Hayes: Mr. Hayes alleges that Gulf discriminatorily failed to promote him to a supervisory position. Although there is evidence that Mr. Hayes was qualified for the position, he did not apply for it. This, despite the fact that Mr. Hayes admitted that he knew of about 17 blacks who had been promoted to supervisor. Hence, Mr. Hayes could not reasonably argue that it would have been a futile gesture for him to make a request to become a supervisor. E.g., *International Brotherhood of Teamsters v. U.S.*, 431 U.S. at 367, 97 S.Ct. at 1870. Because Mr. Hayes failed to make a request for a promotion, he has failed to make out a prima facie case of employment discrimination. Therefore, no inference of intentional discrimination has been raised.

Wesley Bernard: Mr. Bernard alleges that promotions due him were delayed because of test failures,

that he was disqualified from jobs for which he was fit, and that he was discriminatorily denied a promotion to a supervisory position. Since the craft tests do not constitute a *Griggs* violation, Mr. Bernard's test claims are foreclosed by the classwide judgment; his other claims also are without merit.

With respect to his disqualification claim, Mr. Bernard has not proven that he was qualified for those positions. He offered no evidence that a white employee got the position he desired, or about how many blacks requested such a position and had their requests denied or granted. Intentional discrimination cannot be inferred from these facts.

Mr. Bernard requested supervisory promotions twice. The first time was in the early 1960's (by his recollection) and is outside the time frame of this litigation. The second time was in the 1970's (as he recalls) and Mr. Bernard was denied the job in favor of a

Mr. Butaud, a white employee. However, Mr. Butaud was in the top craft position at the time; Mr. Bernard was not. In fact, Mr. Bernard conceded at trial that at the time he made the request he was not qualified for the promotion. Therefore, Gulf had good reason to promote Mr. Butaud over Mr. Bernard. Gulf's selection of Mr. Butaud evidences no discriminatory intent against Mr. Bernard. Mr. Bernard has failed to establish a prima facie case of employment discrimination.

Hence Brown: Mr. Brown testified that he wanted to be a supervisor but that he had not told anyone of his desire because he thought that would have been useless. However, Mr. Brown admitted that he knew of one black supervisor in his department. Moreover, statistics showed that many blacks were promoted to supervisory positions. Mr. Brown should have filed for a promotion. Other blacks at Gulf did request and receive supervisory promotions. Because Mr. Brown did not request a

promotion, he was passed over. No inference of intentional discrimination can be drawn when Plaintiff did not even make a request for promotion.

Therefore, Mr. Brown has not set forth a prima facie case of employment discrimination.

Rodney Tizeno: Mr. Tizeno's claims are that the seniority system at Gulf discriminatorily thwarted his upward mobility, that he was one of the blacks excluded from benefitting under Stipulation 29, and that he was discriminatorily denied promotions to supervisory positions. The classwide judgment forecloses Mr. Tizeno's claims founded upon the mala fides of the seniority system. Although it is true that Mr. Tizeno was one of the blacks who was absent when Stipulation 29 went into effect, he was offered the opportunity, pursuant to the 1971 agreement between Gulf and the government, to enter a two-year training program that would have positioned Mr. Tizeno at or near where Stipulation 29 would have

positioned him. Mr. Tizeno refused the offer. Mr. Tizeno offers only *ad hominem* statements as to why he was qualified for a supervisory job and why he was denied that job. Although he testifies that Mr. Chesser, a white employee, received a promotion he requested, Mr. Tizeno offers no evidence that he was better qualified for that position.

Again, the Court cannot conclude from such snap-shot testimony that Mr. Tizeno was not promoted because of an intent to discriminate against him by Gulf. Mr. Tizeno has failed to make out a prima facie case of employment discrimination.

Willie Johnson: Mr. Johnson's allegations center upon the negative effects the seniority system and testing requirements had upon him. Those claims are barred by the classwide judgment.

Mr. Johnson also complains of an allegedly discriminatory incident in which he was subjected to a

racial slur that was condoned by Gulf and that lead to his self-disqualification from a craft-line position. Even if true, this allegation is barred because the act complained of was not committed within the time period covered by this lawsuit. *See Evans*, 431 U.S. at 558, 97 S.Ct. at 1889.

This decision culminates a long and complex employment discrimination case. The Court has pondered the evidence and the law and has concluded that the seniority system and the employment tests were non-discriminatory. The Court has also found that none of the business procedures and policies followed by Gulf and the OCAW were motivated by bad intent or fell too harshly upon blacks. For these reasons, the Court holds that the named Plaintiffs have failed to demonstrate that either Gulf or the OCAW violated any duty owed to them, individually or as a class, under Title VII of the Civil Rights Act of 1964 or Section 16 of the Enforcement

Act of 1870. Accordingly, Plaintiffs, individually and as a class, take nothing by their action.

FINAL JUDGMENT

This is a class action employment discrimination suit in which Plaintiffs seek declaratory, injunctive, and monetary relief pursuant to Title VII of the civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq. and Section 16 of the Enforcement Act of 1870, 42 U.S.C. § 1981. The named Plaintiffs are present or retired black employees at Gulf Oil Corporation's ("Gulf") Port Arthur, Texas, Refinery. The Plaintiff class consists of black persons who were employed at Gulf's Port Arthur Refinery on or after December 26, 1966, who were members of the Oil, Chemical and Atomic Workers' International Union, Local Union 4-23 ("OCAW"), and who had not executed releases in connection with a Conciliation Agreement between Gulf and the Equal Employment Opportunity Commission ("EEOC"). The Defendants are Gulf Oil

Corporation, predecessor in interest to Chevron U.S.A., a Pennsylvania corporation; the Oil, Chemical and Atomic Workers' International Union; and the Oil, Chemical and Atomic Workers' International Union, Local Union 4-23.

The Court having jurisdiction of the parties and subject matter, the action came on for trial before the Court without a jury. The issues were limited to the individual and class-wide liability of Gulf and the OCAW. Evidence was presented on Plaintiffs' allegations that, *inter alia*,

1. Gulf's seniority system unlawfully discriminated against black employees and was not bona fide;

2. Stipulation 29 to the 1967 Collective Bargaining Agreement between Gulf and the OCAW unlawfully discriminated against black employees;

3. the tests used for promotion to the Mechanical Training Program had an unlawful,

discriminatory effect on black employees and were not job-related;

4. the use of sickness and attendance ("S & A") records in making certain promotions resulted in unlawful adverse impact on black employees, and were used to commit intentional discrimination against black employees;

5. blacks were unlawfully and discriminatorily disqualified from certain jobs because of race;

6. promotions to supervisor were made on a racially discriminatory basis;

7. the OCAW breached its duty of fair representation;

8. the named Plaintiffs Wesley P. Bernard, Elton Hayes, Hence Brown, Rodney Tizeno, and Willie Johnson, Sr. were individual victims of intentional racial discrimination by Gulf and the OCAW.

The issues having been presented and arguments of counsel having been heard, the Court finds that Plaintiffs have failed to prove these or any related allegations of employment discrimination. It is, therefore,

ORDERED, ADJUDGED and DECREED that Plaintiffs, individually and as a class, take nothing by their lawsuit; and, further, that this action is DISMISSED with prejudice, and all parties are to bear their own costs and attorneys' fees.

Supreme Court, U.S.
FILED
JUN 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

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NO. 89-1617

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WESLEY P. BERNARD, *et al.*,
Petitioners,

v.

GULF OIL CORPORATION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether this case, on the craft test issues, presents an appropriate vehicle for the resolution of any questions under this Court's decision in *Ward's Cove Packing Co. v. Atonio,* 109 S. Ct. 2115 (1989).

2.* Whether on the seniority system issues, this case is an appropriate vehicle to address any issue of importance under this court's decisions in *Teamsters v. United States,* 431 U.S. 324 (1977), and *Lorance v. AT&T Technologies,* 104 L.Ed.2d 961 (1989).

3.* Whether there is any issue under *Pullman-Standard v. Swint,* 456 U.S. 273 (1982) raised by the fifth circuit's decision regarding Stipulation 29.

4. Whether the fifth circuit's decision conflicts with *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981).

* We state the questions in the order in which petitioners argued them rather than the order in their statement of the "Questions Presented."

II

GULF OIL CORPORATION'S PARENT COMPANY AND NON-WHOLLY OWNED SUBSIDIARIES

Chevron Corporation - Parent Company

A. K. Chemie G.m.b.H.; Aditivos Mexicanos, S.A. de C.V.; Aircraft Fuel Supply B.V.; American Overseas Petroleum Limited; American Overseas Petroleum (Spain) Limited; Arabian American Oil Company; Associated Octel Company (South Africa) (Proprietary) Limited; Associated Octel Company Limited, The; Associated Octel Company (Plant) Limited; Atlas Supply Company; C-W Properties, Inc.; Calson (Bermuda) Limited; Cansulex Limited; Cansunsulex Limited; Canyon Reef Carriers, Inc.; Chevron Canada Resources Limited; Chevron do Brasil Participacoes e Empreendimentos Ltda.; Coromandel Fertilisers Limited; Dixie Pipeline Company; Explorer Pipeline Company; F C Marine Inc.; Felix Oil Company; Fuel Marine International Ltd.; Glen Park Gas Pipeline Company Limited; Glenwood Properties; Golden Bear Operating Company Limited; Gulf Oil Zaire S.A.R.L.; Hyson (Nigeria) Limited; Internacional de Basicos y Quimicos, S.A. de C.V.; Kenai Pipe Line Company; Later Chemicals Limited; Maasvlakte Olie Terminal N.V.; Mid-Valley Pipeline Company; Nippon Petroleum Detergent Company, Limited; Octel Societe Anonyme; Orogil, S.A.; Orogil, S.A.; Oronite Japan Limited; Paloma Pipe Line Company; Pembroke Capital Company Inc.; Plantation Pipe Line Company; Plastigama S.A.; Platte Pipe Line Company; Refineria Petrolera de Guatemale-California, Inc.; Rimbey Pipe Line Co. Ltd.; Saraco S.A.; Societa Italiana Additivi per Carburanti SpA (S.I.A.C.); Societe Octel-Kuhlman; Solvent Refined Coal International, Inc.; Standard Pacific Gas Line Incorporated; Sultran Ltd.; TAR - Tankanlage Ruemlang A.G.; Trans-Arabian Pipe Line Company; UBAG - Unterflurbetankungsanlage Flughafen Zurich; Valent U.S.A. Corporation; West Texas Gulf Pipe Line Company

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NO. 89-1617

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WESLEY P. BERNARD, *et al.*,
Petitioners,

v.

GULF OIL CORPORATION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Gulf Oil Corporation, *et al.*, respectfully pray that the petition for writ of certiorari to review the judgments and opinions of the Court of Appeals for the Fifth Circuit be denied.

STATEMENT OF THE CASE

With several exceptions, petitioners' statement of the case is adequate. Initially, the statement that, "The Fifth Circuit reversed, and directed the district court to re-

consider its disposition of a number of the discrimination claims" (Petition, p. 5) is incorrect. The fifth circuit, in fact, affirmed the trial court's disposition regarding Gulf's selection of supervisors and other matters. The court vacated the judgment regarding the seniority system, Stipulation 29 and the testing issues. (129a-130a). Further, the degree of respondents' reliance on *Lorance v. AT&T Technologies* (Petition, p. 5) is exaggerated. *See infra* at pages 25 *et seq.*

In addition, the Court should be advised that a respondent herein, Local No. 4-23 of the Oil, Chemical and Atomic Workers International Union, filed for bankruptcy April 4, 1990, in the United States District Court for the Eastern District of Texas, Beaumont Division, Bankruptcy Case No. 90-10222-S.

STATEMENT OF FACTS

Petitioners' Statement of the Facts contains numerous statements that are argumentative and misleading. Rather than engaging in a tedious point-by-point refutation, we commend the Court to the neutral statement of the facts set forth in the fifth circuit's prior opinions. (4a-10a, 56a-67a, 78a-85a, 95a-97a). Respondents object to petitioners' statement of the facts to the extent that it departs from facts set forth by the court of appeals, which for the most part it purports to track. In addition, certain specific objections are appropriate.

(1) Promotion Tests

Respondents take exception to the statement that "[T]he lower courts found, that the test had an unlawful disparate impact in violation of Title VII." (Petition, p. 11). Petitioners obviously confuse a finding of adverse impact with a finding of illegality. (96a)

(2) Stipulation 29

Beyond the general objections made above, respondents object to petitioners' use of PX87 (Petition, p. 12, n.4 and p. 13) and the arguments arising therefrom, since the trial court specifically granted defendant's motion to exclude that exhibit by order dated February 24, 1986, and this order was upheld by the court of appeals. (54a-55a).

Petitioners' statement of the facts on the issue of the disparate impact of Stipulation 29 is so one-sided as to require balancing. This Court should be aware that the primary negative effect of Stipulation 29 is a highly attenuated possibility of advancement for 18 employees. The only persons affected would be those employees from among the 18 black senior utility men, who would have bid all the way up the craft line of progression, successfully completed the Old Mechanical trainee program and bid into the No. 1 craft jobs. (91a, n. 30 and accompanying text). *See also* the Appendix to the court's opinion at 133a. It is also important to note that the court of appeals determined that Stipulation 29 did not lock blacks out of top positions for 10 years as petitioners had claimed below and re-argue here. (Petition, pp. 12-14).

> Between 1957 and 1984 the Port Arthur refinery experienced a 51% reduction in force, from 5,481 employees in 1957 to 2,872 employees in 1984. During this period, black representation in the work force increased from 16% to 21%. The number of available mechanical training positions and No. 1 craft jobs increased from 490 in 1966 to 764 in 1967 and remained relatively constant thereafter. Therefore, Stipulation 29 actually increased the number of top jobs. It also had the effect of eliminating many intermediate job classifications, thereby making upward mobility to the top craft jobs easier. (93a).

REASONS FOR DENYING THE WRIT

Petitioners recount to some degree the long and arduous history of this case. (Petition, pp. 19-20). We agree that the history of this "aging Title VII case" is relevant to this Court's inquiry, but suggest that the equities it demonstrates and the message it sends are quite different from that implied by petitioners.

Respondents have spent fourteen years of costly litigation defending employment practices that go back decades to a time of major social change at the Port Arthur Refinery and in our society in general. As the district court recognized, this is not a record that demonstrates reluctant compliance with the minimum the law required, but rather one that shows respondents were at the forefront of progressive attempts to correct the racial problems of the past. (148a-150a). Gulf's affirmative action programs; its testing programs and their validation, like this litigation were massive and expensive, and as this record strongly demonstrates, were highly effective.

This is indeed, as petitioners suggest, a case from the past, involving old disputes, which except for this endless litigation, have been largely mooted by history. We believe it is fair to say that this lawsuit, rooted in problems of the sixties and seventies and before, is a poor tool for fashioning the development of Title VII law in the nineties. As will be demonstrated, petitioners' attempt to breathe life into this record, simply doesn't work. It is time for this case to end.

I. THIS CASE, ON THE CRAFT TEST ISSUES, DOES NOT PRESENT AN APPROPRIATE VEHICLE FOR THE RESOLUTION OF ANY QUESTIONS UNDER THIS COURT'S DECISION IN *WARD'S COVE PACKING CO. V. ATONIO*, 109 S. CT. 2115 (1989).

Petitioners' approach to this issue is premised upon a

number of flawed assumptions about this Court's decision in *Ward's Cove Packing Co. v. Atonio,* 109 S. Ct. 2115 (1989); its decisions in *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971) and *Albermarle Paper Co. v. Moody,* 422 U.S. 405 (1975) and the development of the law since those seminal cases. Coupling those assumptions with a misapprehension or a mischaracterization of the Fifth Circuit's treatment of these issues, leads petitioners to the creation of a series of problems or conflicts which, while imaginative and superficially compelling, have little connection with reality or this record. We respectfully suggest that petitioners' attempt to create appropriate issues for consideration on certiorari is a house of cards which collapses upon close analysis.

A. This record does not raise significant issues under *Ward's Cove.*

Petitioners' main thrust is that this record presents this Court with an opportunity "not to overturn *Ward's Cove* but merely to explain it." (Petition, p. 22). The primary focus advanced for that need for explanation is this Court's substantive standard announced in *Ward's Cove,* of "whether a challenged practice serves in a significant way the legitimate employment goals of the employer." *Ward's Cove,* 104 L.Ed.2d 733, 752. Petitioners purport to find this phrase not only unique, having "never been utilized by a single lower court decision," but also incomprehensible. (Petition, pp. 22-23).

Semantics aside, we suggest that the basic substantative approach of this Court in *Ward's Cove* did not fall suddenly from the sky. In fact, petitioners needed to go no further in their "orthodox legal research" (*See* Petition, p. 22) to have found a test similar to the *Ward's Cove* test applied by the fifth circuit, in this very case, in its 1988 opinion. *See* 98a *et seq.* Judge Reavley, in that

opinion, took pains to analyze the proper standard and noted as a starting point, well before *Ward's Cove,* that there were two lines of cases interpreting *Griggs* and *Albermarle* on this issue. The first, represented by *Watkins v. Scott Paper Company,* 530 F.2d 1159 (5th Cir. 1976), *cert. denied,* 429 U.S. 861 (1976), essentially required that any selection device be "necessary to the business goals of safety and efficiency. *Id.* at 1168-69 (the business necessity standard)"; the second illustrated by *Contreras v. City of Los Angeles,* 656 F.2d 1267 (9th Cir. 1981), *cert. denied,* 455 U.S. 1021 (1982) which held:

> [T]hat an employer must by professionally accepted measures prove that the test is 'predictive' of or significantly correlated with important elements of work behavior that comprise or are relevant to the job or jobs for which the candidates are being evaluated. *Id.* at 1280 (the significantly correlated standard). (99a).

Judge Reavley opted to apply the *Contreras'* standard rather than the business necessity standard, following *New York City Transit Authority v. Beazer,* 440 U.S. 568 (1979). There, citing *Griggs* and *Albermarle,* this Court noted that even though the nonhiring of methadone users was not required, the employer's goals were significantly served by such a policy and that:

> [T]he record thus demonstrates that TA's rule bears a 'manifest relation to the employment in question'. *Griggs,* 401 U.S. 424 (1971); *Albermarle Paper Co.,* 422 U.S. 405, 425 (1975). (102a-103a).

The *Ward's Cove* standard was not an innovation, nor was the "business necessity" defense the "familiar standard" applied routinely by "federal courts at all levels".

See Petition, p. 24.[1] Justice O'Connor's plurality opinion in *Watson v. Fort Worth Bank & Trust,* 101 L.Ed.2d 827, 847 (1988) foreshadowed the present Court's interpretation of "business necessity" or "job relatedness" as premised upon the "manifest relationship to the employment in question" aspect of *Griggs,* but noted that:

> [S]uch a formulation should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant. On the contrary, the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times. *Id.*

We suggest that there is no mystery whatever about the standard ultimately applied in *Ward's Cove.* It was an evolution directly from *Griggs* itself and was the rejection of the theory of those cases which had applied the strict "business necessity" standard. That *Ward's Cove* ultimately resolved the ambiguity in *Griggs* is not a new departure but a choice between two legitimate and longstanding interpretations of that precedent.

Significantly, the court of appeals, in its 1989 opinion (31a-32a), did not cite *Ward's Cove* on the issue of "standard" but rather applied the same "significantly correlated" standard that had been utilized in that court's 1988 opinion. (100a-105a). It is particularly surprising that petitioners suggest that *Ward's Cove* has been read by the fifth circuit as "virtually eviscerating *Griggs* and *Albermarle*" *See* Petition, p. 24. In fact, if there is any ambiguity in the *Ward's Cove* standard, the court of

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1. Compare *New York Transit Authority v. Beazer,* 440 U.S. 568 (1979) and *Washington v. Davis,* 426 U.S. 229 (1976), with *Dothard v. Rawlinson,* 433 U.S. 321, 332 n. 14, 97 S. Ct. 2720, 2728, n. 14 (1977).

appeals in this case came down squarely in line with existing pre-*Ward's Cove* precedent.[2] Therefore, to suggest that *Bernard* is an appropriate vehicle to explore the limits of the standard enunciated in *Ward's Cove* is absurd, as is the suggestion that somehow *Bernard* conflicts on this issue with *Griggs* and *Albermarle* in a way that was not harmonized and resolved by *Ward's Cove.*

The real departure *Ward's Cove* made from precedent can be argued to be on the question of burden of persuasion vs. burden of production. *See Ward's Cove v. Atonio,* 104 L.Ed.2d 733, at 753. We respectfully suggest that if the allocation of burdens cannot be squared between *Griggs* and *Ward's Cove,* that petitioners' argument is with Justice White and the majority in *Ward's Cove* rather than with Judge Higginbotham in *Bernard.* Petitioners may well object to this allocation of burdens, however, that is certainly no foundation for a suggestion that *Ward's Cove* should be "explained" on this issue in this case. There is nothing obscure about the allocation of burdens. The Court in *Ward's Cove* itself noted:

> [T]his rule conforms with the usual method of allocating persuasion and production burdens in the federal court. *See* Fed. R. Evid. 301, and more specifically it conforms to the rule in disparate treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration. *Ward's Cove,* 104 L.Ed.2d at 753. (Citations omitted).

In summary, petitioners' claim that the *Ward's Cove* standard is obscure is unwarranted.[3] The suggestion that

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2. See *Albermarle Paper Co. v. Moody,* 422 U.S. 405 at 431.

3. Cases which decided post-*Ward's Cove* have had no discernible problem in applying it. See *Allen v. Seidman,* 881 F.2d at 377 (7th Cir. 1989); *Evans v. City of Evanston,* 881 F.2d at 383 (7th Cir.

the burden of proof needs substantial explanation really does not rise to the level of serious argument.

B. *Bernard* does not significantly conflict with *Griggs* or *Albermarle* on test construction or validation.

Petitioners' argument goes on to assume a fundamental conflict between the *Bernard* decision and *Griggs* and *Albermarle* on test validation. Apparently exercising clairvoyant powers, petitioners tell this Court that the:

> Fifth Circuit had no doubt that *Ward's Cove* required it to sustain in this case tests that combine the very characteristics that had led this Court to condemn the tests at issue in *Griggs* and *Albermarle*. . . . (Petition, pp. 24 & 25).

This is puzzling, given the lack of reliance on *Ward's Cove* by the fifth circuit in its 1989 opinion,[4] and the fact that substantial testing issues were decided in 1988 prior to *Ward's Cove*. (111a *et seq.*). Petitioners' attempt to target *Ward's Cove* as the source of the fifth circuit opinions in this regard is as transparently opportunistic as it is at variance with the fifth circuit's express opinions.

1989); *Mallory v. Booth Refrigeration*, 882 F.2d 908, 912 (4th Cir. 1989); *Rendon v. AT&T Technologies*, 833 F.2d 388, 390 (5th Cir. 1989); *International Union v. State of Michigan*, 886 F.2d 766, 770 (6th Cir. 1989); *Hill v. Seaboard*, 885 F.2d 804, 811 (11th Cir. 1989); *International Union v. Johnson Controls, Inc.*, 886 F.2d 871, 887 (7th Cir. 1989); *Green v. USX*, 52 FEP Cas. 168 (3rd Cir. 1990); *Lowe v. Commack Union Free School District*, 886 F.2d 1364, 1369 (2nd Cir. 1989); *Bertek v. Urban Redevelopment*, 882 F.2d 739, 742 (3rd Cir. 1989); *Bruno v. W. B. Saunders Co.*, 882 F.2d 760 (3rd Cir. 1989); *Williams v. Giant Eagle Markets Inc.*, 883 F.2d 1184, 1192 (3rd Cir. 1989); *Edwards v. Johnston County Health Department*, 885 F.2d 1215, 1233 (4th Cir. 1989); *Gagné v. Northwestern National Insurance Co.*, 881 F.2d 309 (6th Cir. 1989); and *United States v. State of Louisiana*, 718 F. Supp. 525, 532 (D.C. La. 1989).

4. In this regard, it should be noted that *Ward's Cove* was relied upon in the testing context on the issue of the standard for a lesser disparate alternative. (33a)

Beyond that, the class' assumption of a clear conflict between the fifth circuit in this case and *Griggs* and *Albermarle* is simply not supportable. Petitioners parade a series of supposed parallels between the factual situation in *Griggs* and *Albermarle* and the factual situation before the court in *Bernard* and build a conclusion of inconsistency. (Petition, pp. 24-42). This misses the point of the job relatedness validation process. It is very fact and context specific. As stated in *Albermarle*: "the question of job relatedness must be viewed in the context of the plant's operation and the history of the testing program." *Id.* at 427. It must also be viewed in the context of the validation study actually performed in each case. We are dealing here with the evaluation of tools used to determine job relatedness. These are not constants. The upholding of the Wonderlic personnel tests as valid in one context is not transferrable, just as those tests are not *malum in se* because they didn't pass muster in *Griggs* or *Albermarle*. As the court in *Griggs* was careful to state:

> *On the record before us* neither the high school completion requirement nor the general intelligence test be shown to bear a demonstrable relationship to the successful performance of the jobs for which it was used. Both were adopted, as the court of appeals noted, without meaningful study of their relationship to job performance ability. *Griggs*, 401 U.S. at 431, *emphasis supplied.*

Griggs was decided in 1971, and while that decision created employer sensitivity to the need for validation studies, there was no study at all in *Griggs*. In *Albermarle* the study was much too little too late:

> After this Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and *on the eve of trial, Albermarle* engaged an industrial psychologist to study the 'job relatedness' of its testing program. *Id.* at 411, *emphasis supplied.*

That the validation study conducted under these circumstances was flawed is hardly surprising. The Court noted that as to the Wonderlic tests "the company made no attempt to validate the tests for job relatedness . . ." *Id.* at 428.

As to the other tests involved in *Albermarle*, there was really no record of validation except for vague recollections by plant officials. The court noted, "Job relatedness cannot be proved through vague and unsubstantiated hearsay." *Id.* at 428 n. 23. The Court pointed out that:

> Jobs were grouped together solely by their proximity in the line of progression; no attempt was made to analyze jobs in terms of the particular skills they might require. *Id.* at 430.[5]

The records in *Griggs* and *Albermarle* stand in stark contrast to the record here. The superficial similarities to the defects there were explained and clarified by competent expert testimony which made it clear that here these were not defects at all, but rather natural adjustments to the mathematical rules that govern the sophisticated use of statistical analysis. (28a-29a). As the court of appeals noted, this record is quite a different matter.

> In the face of statistically significant correlations, professional test construction, commonality of abilities associated with the various jobs at issue, the 'path analysis' correlations of the Old and New Tests, and the supporting expert opinion based upon massive validation studies of similar tests in the industry, this

5. Justice Stewart recognized the validation study attempted by the employer in *Albermarle* was doomed to failure in refusing to uphold the outright reversal of the district court by the court of appeals, because that implied that an injunction should immediately issue against all testing at the plant. The court recognized the employer in its validation process, had been without appropriate guidelines and that that process was in its infancy. "The appropriate standard of proof of job relatedness has not been clarified until today." *Id.*

> court will refrain from making business decisions for an employer when it is not clearly erroneous that its promotion practice is validly job related. (35a, 153a-173a).

1. Gulf's tests "measured the person for the job".

Petitioners argue that the *Griggs* requirement that any selection device "must measure the person for the job and not the person in abstract," has not been met. 401 U.S. at 436 (Petition, p. 30). Petitioners' argument is essentially with the "performance elements" used by supervisors to evaluate the job performance of incumbent employees in the pipefitting and boilermaking departments. (108a, n.5). In essence, petitioners argue for a one dimensional test based upon "duty elements" rather than tests relating to the "ability elements" which, in fact, were the focus of the criterion development. (109a). Petitioners apparently would have the tests begin and end with a carpenter sawing a straight line in hot temperatures—at heights! (Petition, pp. 30-31). The court of appeals supported the trial court's rejection of this approach:

> The district court found that the criteria employed by RBH (the consulting firm employed) accurately reflected the important elements that comprised the jobs studied. The court noted that 'about one-half of [Gulf's] criteria are actual duty elements of the same character of plaintiffs'. In reaching its conclusion, the court emphasized that the positions for which adequate test performance was a prerequisite required certain cognitive abilities and that performance on tests which were designed to correlate solely with the duty elements would be a poor predictor of job performnace.

The court of appeals went on to hold that the "criteria used to evaluate job performance consisted of important elements relevant to the job studied," noting that:

> Upon successful completion of a training program an employee promotes to the top position for which he has trained. Gulf's proof supports the conclusion that the possession of certain cognitive abilities is important to success as a trainee and a craftsman. (111a-112a; 235a-237a).

Petitioners' argument goes beyond fair comment when it states:

> The district court expressly held that black workers who failed the disputed test in large numbers, generally had the abilities and experience required to carry out the duties of craftsmen. (Petition, pp. 31-32).

On the contrary, the district court found that some of the labor group had experience in the "handling of tools and materials"; relevant to some of plaintiffs' proposed "duty elements." (237a). These "duty elements" measured "only the abilities to perform the actual duties of the lowest craft job." (235a, n. 6). The trial court's express position was that such experience was useless to predict which workers in the labor group had potential for promotion. (236a-238a). Relevant testing is not concerned with the purely physical ability to handle "tools and materials" rather it involves the ability to make and implement responsible decisions in the intense and dangerous context of a working refinery.[6]

The court of appeals correctly distinguished *Albermarle* noting:

> In *Albermarle* the tests were not found to be job related because 'no attempt was made to analyze jobs in terms of the particular skills they might require.' Here, the jobs were all analyzed in terms of particular skills and the test studies were conducted accordingly. (29a-30a).

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6. Petitioners' further argument that "Gulf offered an ingeniously circular form of validity study" (Petition, p. 32), is a total distortion of the record and the methodology employed in the testing program. (108a-110a)

2. The New Tests were properly validated.

Petitioners mischaracterize the action of the courts below regarding the correlation co-efficients developed for the New Tests. (Petition, p. 39).[7] Petitioners further claim that the district court felt it was "obligated to sustain the tests in light of the new 'rather lighter' standard of business justification in *Watson* . . ." (Petition, p. 39), is belied by the fact that the district court also expressly decided the case on the basis of the pre-*Watson* burden of persuasion standard and found that that stricter standard had also been met. (193a).

Petitioners distort the impact of *Ward's Cove* and *Watson* upon the 1989 opinion of the fifth circuit because they apparently misunderstand the meaning and scope of the original remand in 1988. The basis of the remand on this issue of the correlation co-efficients was not a search for "magic" numbers or a reconciliation of conflicts, but rather an attempt to understand "the basis for the district court's holding that the tests are job related." (115a). In its 1989 opinion, speaking of its earlier decision, the court so stated: "This court found no way to determine the basis for the district court's holding, however, so remanded for further findings . . ." (28a). The 1989 court clearly did not, as petitioners allege, no longer think this issue important, "sustaining the tests without bothering to decide how often test scores correlated with job performance." (Petition, p. 41). Rather, as to the boilermakers and pipefitters, now having the needed findings of fact, the court held that, "The district court was not clearly erroneous and its findings are supported by the expert testimony in the record." (29a).[8]

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7. The apples and oranges nature of any comparison between the *Bernard* studies and the "study" done in *Albermarle* have already been discussed. See above Pages 9-12.

8. The study showed that performance on the New Tests correlated .32 with job performance as a boilermaker, and .22 with

Petitioners attack the validity studies stating:

> This is precisely the sort of crazy quilt pattern which *Albermarle* insisted would preclude inferring that a test was valid for a job which had not been studied, or regarding which a study had shown no correlation. (Petition, p. 36).

The path analysis, here, was supported by competent expert testimony as to mathematical similarity coefficients. (153a-168a). Such a comparison of abilities had not been attempted, let alone demonstrated in *Albermarle*. It was sufficient here "to generalize the validity of the new tests from boilermakers and pipefittters to craft jobs involving similar abilities." (30a). Here as elsewhere, petitioners confuse the "duty elements" with the "ability elements" which were the focus of the extension to the other crafts involved. The class attempts to undermine this extrapolation by saying that no study was done to show that painters, carpenters, pipefitters and laboratory technicians do essentially the same thing. (Petition, pp. 35-36). However, it is not the nature of the duties that control this analysis but the nature of the abilities and skills necessary to do the jobs involved. (30a-32a).

Despite the exhaustive nature of the studies performed, the tests could not be validated as to all jobs involved. (107a; 153a *et seq.*). Where numbers or other statistical or test construction problems prevented the achieving of

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performance as pipefitter, and that these correlations are both statistically significant.

Although the unadjusted correlations are statistically significant, the adjusted figures, which are even higher than unadjusted, are better estimates of validity, and even they underestimate the true validity of the New Tests.

The testimony of Gulf's expert witnesses was convincing, and they adequately explained, based upon research and their past experience, why the tests were job related, why the correlation coefficients resulting from the study needed to be adjusted for various factors, and why these adjusted figures were more accurate. (28a-29a).

accurate results,[9] the 1988 court had invited the district court to consider an approach using similarity between pairs of jobs to generalize the validity of the New Tests from the boilermakers and pipefitters to other jobs involving similar abilities. The court specifically invited the use of "similarity co-efficients." (116a, n. 54). The development of the need for and results of this analysis are set forth in detail in the trial court's findings of fact. (156a-168a). Grounded upon this solid expert testimony and appropriate precedent (30a), district court's findings were not only not clearly erroneous but were the only findings reasonably drawn from the validation studies.

3. Path analysis properly validated the Old Tests.

Regarding the Old Tests and the path analysis that was used to validate those tests, petitioners again resurrect the ghost of the flawed validity tests in *Albermarle* and focus on the fact that the specific parts of the Old Tests and New Tests were not, in fact, identical. (Petition, p. 37). Again, they neglect to deal with the foundation for that path analysis provided by competent expert testimony.

The methodology of the path analysis employed by Gulf's experts, in essence, established the validity of the old tests by multiplying the correlation coefficient between the old and new tests and the relevant new test correlation coefficient for each job category. The initial correlation coefficient was arrived at by comparing the test scores on the Old Tests and the New Tests for the group of indi-

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9. Petitioners repeatedly confuse the invalidity of a test with the inability to validate a test. Inability to validate does not mean the test is invalid. It only means that because of the sample size, some other statistical shortcoming or some contaminate, accurate data is not available. (157a *et seq.*) (See for instance petitioners' discussion of welders, (Petition, p. 40) and petitioners' misleading claim that Gulf knew certain of its tests might not be valid based upon the letter reflected at Page 38, n. 17 of the petition).

viduals who had actually taken both tests. The correlation coefficient between the test batteries was measured at .72. (DX. 127; T1070-1074, 1134-1135. DX. 128; T1073-1074, T1134-1135, T1356-1357, T1381-1382). This technique gives an estimate of the Old Test validity which is an absolute minimum. (T1072, T1382). The Old Tests were found to validly predict performance in the jobs for which they were used. (T1073, 1357). Furthermore, the path analysis was not challenged by petitioners' testing expert or statistician. Gulf's experts supplied the only evidence in the record on the validity of the Old Tests.

Petitioners now contend that the two sets of tests could not have been similar because the content of the tests was different. (Petition, p. 37). This is a classic *non sequitur*. The similarity coefficient of .72 between the tests makes that clear. Petitioners' logic would, we suggest, conclude that the readings of farenheit and centigrade thermometers cannot be said to measure the same thing because of their different scales.

Petitioners also claim that it is "undisputed that the Old Tests were scored far more stringently than the New Tests . . ." (Petition, p. 37). Nothing in the record supports that claim. It is not clear whether petitioners are here talking about the existence of cutoff scores. If that is their argument, it doesn't work, since there is no evidence in the record that there were cutoff scores. As the court of appeals determined:

> From 1947 to 1971 the 'Old Tests' were used to screen bidders and since 1971 the 'New Tests' have been administered. Gulf considered test results along with other qualifications to determine whether senior bidders would be awarded trainee positions; *no cut off scores were used. Bernard,* 841 F.2d at 561 (*emphasis added*), (95a-96a).

Petitioners' use of rejection data is simply irrelevant to the question once the nature of the process of selection is understood.

4. There is no conflict with *Griggs* or *Albermarle* regarding the "good faith standard" since such standard was never used.

At Pages 41 and 42 of the Petition, petitioners make a puzzling argument. They opine that, "The panel read *Watson* in particular to require federal courts to attach heavy weight to the mere fact that an employer believed in good faith that its tests were job related," and go on to argue the fifth circuit, apparently contrary to *Griggs* and *Albermarle,* "construed *Watson* to hold, such a good faith belief can defeat a disparate impact claim . . ." and, therefore, *"Griggs* and its progeny have collapsed back into the requirement that a Title VII plaintiff prove discriminatory intent." There follows the proposition that certiorari should be granted "to resolve whether, as the courts below concluded, *Ward's Cove* and *Watson* have largely eviscerated *Griggs* and *Albermarle."* (Petition, p. 42). One struggles in vain to find the slightest support for the position that Judge Higginbotham read a good faith standard into this issue. The court said:

> This court will refrain from making business decisions for an employer when it is not clearly erroneous and, its promotion practices validly job related. '[I]t must be borne in mind that [c]ourts are generally less competent than employers to restructure business practices and unless mandated to do so by congress they should not attempt it. *Watson v. Fort Worth Bank & Trust,* 108 S. Ct. 2777, 2791 (1988), quoting *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 578 (1978), (35a).

This is but one more example of petitioners' repeated attempts to manufacture an issue for certiorari which

simply does not exist on this record. It is obvious that the court of appeals and the *Watson* and *Furnco* courts were speaking not about "good faith"[10] but rather were addressing an issue of judicial restraint and the proper role of the judiciary in the complex and troublesome area of the work place.

Conclusion

There is no basis for viewing this case as appropriate to raise serious issues under *Ward's Cove, Griggs* or *Albermarle*. This record, massive and complex as it may be, simply does not present a close case.

Far from reaching the "definite and firm conviction" that the trial court's findings were not "plasible in light of the record viewed in its entirety." *Anderson v. City of Bessemer,* N.C. 470 U.S. 564, 573-74 (1985), a review of the district court's findings and the relevant portions of the record[11] would lead an objective analyst to conclude that these tests significantly advanced legitimate employment goals. The uncontroverted evidence in the trial court demonstrated that the tests also had a sizeable economic benefit, calculated to result in savings of $25,000,000. (T1360, 1362 and DX. 139, p. 2, T1359-1361). This analysis, compelling as it was, included only economic variables and not the additional intangible, but no less real, costs associated with failure, such as increased risk of catastrophic accidents, morale considerations incident to retraining and return to other jobs, etc.

As alluded to by the Supreme Court in *Ward's Cove Packing Co. v. Atonio,* 109 S. Ct. 2115, 2120 n.4 (1989), when dealing with disparate impact cases, one should bear in mind that there is demonstrably no intent to discrimi-

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10. *Cf. Griggs,* 401 U.S. at 432.

11. (151a-172a) and T1033-35, T1037-39, T1051-53, T1070, T1073-74, T1138-41, T1330-33, T1340-47, T1354-59.

nate (otherwise it would not even be necessary to reach the disparate impact question).[12] Testing is not a *malum in se*. In fact, when implemented properly, testing is anti-discriminatory because it renders impossible the operation of individual bias. The overwhelming evidence of the years of test development and its attendant expense, job analysis, and the emphasis placed upon qualification and training for these critical refinery jobs is consistent with an employer undertaking to achieve important business goals.

It is futher useful to recognize that the harm attributable to the tests consisted of the opportunity to train for approximately thirty jobs over a twelve year period (152a-168a), as compared to benefits measured in the tens of millions (DX 139). Respondents do not contend these facts would justify an otherwise illegal policy, but they are relevant to the statement of this Court in *Ward's Cove* that "a mere insubstantial justification of a business practice will not suffice." 109 S. Ct. 2126. This was the pre-*Ward's Cove* law as well. *See New York City Transit Authority v. Beazer,* 404 U.S. at 586-587 n. 31 (1979).

We respectfully submit that the findings of fact of the district court on the testing issues were not clearly erroneous as the court of appeals properly found, but rather were compelled by this record. Further, the standards employed by the court of appeals in reviewing this record were entirely consistent with relevant decisions of this Court. Petitioners' attempt to rewrite the history of this case, those findings, the court of appeals' opinions and relevant precedent to create issues which they perceive as appealing for a grant of certiorari should be recognized for what it is and treated accordingly.

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12. The trial court and the court of appeals found no disparate treatment (i.e. intentional discrimination) in the facet of employment most commonly subject to attack on that basis, promotion to supervisor. 861 F.2d 569.

II. ON THE SENIORITY SYSTEM ISSUES, THIS CASE IS NOT AN APPROPRIATE VEHICLE TO ADDRESS ANY ISSUE OF IMPORTANCE UNDER THIS COURT'S DECISIONS IN *TEAMSTERS V. UNITED STATES*, 431 U.S. 324 (1977), AND *LORANCE V. AT&T TECHNOLOGIES*, 104 L.Ed.2d 961 (1989).

Petitioners' argument here, as their statement of the issue involved indicates, is again premised upon a series of assumptions. (Petition, p. 42). The first assumption is that the decision below conflicts with *Teamsters v. United States,* 431 U.S. 324 (1977). Petitioners leap from that assumption to the assumption that an issue is raised as to whether or not that "conflict" was compelled by *Lorance v. AT&T Technologies,* 104 L.Ed.2d 961 (1989). Just as in the testing issues, petitioners attempt to assume this case into a posture which it simply does not have. The demonstration of that proposition requires only the examination of the purported foundation for those assumptions.

Petitioners' basic argument is premised upon the assumption that the court of appeals in this case found discriminatory genesis to be "legally irrelevant." (Petition, pp. 46-48). Such a position, petitioners argue, is directly contrary to *Teamsters* and its progeny. We are constrained by Supreme Court Rule No. 15.1 to point out that this assertion by petitioners is at variance with the record. The court of appeals did indicate in its 1988 opinion that it inferred "discriminatory intent from Gulf's pre-act seniority system . . ." (76a). However, it never concluded that the system had its genesis in racial discrimination. Rather the court of appeals had decided the district court's finding on genesis was not clearly erroneous, despite the fact that it could infer some discriminatory

intent. The scope of the remand, makes that clear.[13] Any uncertainty petitioners may have had on this issue, was decisively clarified in the court's 1989 opinion where, after setting out the *James* factors, Judge Higginbotham unequivocally stated:

> This court [in 1988] found the first three of the factors in favor of defendants, but remanded to the district court to consider whether Stipulation 29 showed the system had been maintained with a discriminatory purpose. (16a-17a).

The third factor of course, is "whether the seniority system had its genesis in racial discrimination." (16a). Petitioners never mention this holding, but proceed to construct a hypothetical case for this Court's consideration. We respectfully suggest petitioners' "issue" regarding a conflict with *Teamsters,* because of a holding that genesis was legally irrelevant, is most charitably described as a "non-issue," since there was never a finding of genesis in the first place.[14]

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13. Relying on *James v. Stockham Valves & Fitting Co.,* 559 F.2d 310 (5th Cir. 1977), the district court had found specifically that . . . "[U]nder *James* Factor No. 3, Gulf's seniority system did not have its genesis in racial discrimination." (227a). In *Pullman-Standard v. Swint,* 456 U.S. 273 (1982) the district court, applying the *James* standards, found no discriminatory purpose in the seniority system involved, and held it to be *bona fide.* The fifth circuit, also applying the *James* standards, reversed and concluded that the seniority system did result from an intent to discriminate. This Court held "discriminatory intent here means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive." Thus a court of appeals may only reverse a district court's finding on discriminatory intent if it concludes that that finding is clearly erroneous under Rule 52a. *Pullman-Standard,* 456 U.S. 289-290.

14. It is frankly tempting to go further and engage petitioners on the ground they choose in their hypothetical. Even had there been a finding of genesis, petitioners' second assumption that the court of appeals suggested it was legally irrelevant, is likewise inaccurate. The suggestion of the court was that it would not be controlling if it were the sole factor met in the *James* scenario. That is totally in accord with existing law. Research discloses no case which has ever

The fact that the court of appeals inferred pre-Act discriminatory intent carries petitioners no further. Beyond the fact that the court of appeals did not overturn the trial court's finding on this issue,[15] it is clear that the rules from which the court inferred discriminatory intent were no longer a part of the system being implemented. (75a-76a). The tools of discrimination had been discarded long before and the fact that the effects of that discrimination were locked in by a neutral seniority system is precisely what *Teamsters* addressed and permitted under Title VII. *Teamsters,* 431 U.S. at 353.

Petitioners miss the message of *Teamsters* entirely, in arguing that "a pre-Act seniority system which discriminated will make an otherwise *bona fide* post-Act seniority system illegal." (Petition, p. 48). The court of appeals was correct and consistent in citing *Teamsters* for the proposition that a "seniority system does not become illegal 'simply because it allows the full exercise of the pre-Act seniority rights of employees of a company that discriminates before Title VII was enacted'." (12a—quoting *Teamsters,* 431 U.S. at 353); *See also United Airlines v. Evans,* 431 U.S. 553, 558. The crux of the matter is that in *Teamsters* and every major case construing it, the existence of pre-Act discrimination was the starting point for analysis rather than the conclusion, as petitioners seem to believe.

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held that the meeting of one of the *James* factors in isolation is sufficient to render a seniority system non-bona fide. In *Larkin v. Pullman-Standard Division, Pullman, Inc.,* 854 F.2d 1549, 1577-78 (11th Cir. 1988), the court held that the finding of genesis is not sufficient, standing alone to render a system non-bona fide. That issue, however, is not properly raised on this record.

15. The district court made no finding of discriminatory intent; therefore, the statements of the court of appeals in its 1988 opinion on this issue should be construed consistently with *Pullman-Standard v. Swint,* to be a part of the court's discussion determining that the trial court's genesis finding was not clearly erroneous rather than constituting a separate holding. *See* Footnote 13.

Petitioners suggest a conflict between *Teamsters* and this Court's recent decision in *Lorance v. AT&T Technologies,* 104 L.Ed.2d 961 (1989) and strive mightily to give this Court the impression that respondents "relied in particular on the recent decision" in *Lorance* and ". . . the fifth circuit embraced that view of section 703(h), reiterating that pre-Act discrimination in the creation of a seniority system was in its view legally irrelevant." (Petition, pp. 47-48).

Respondents' reliance on *Lorance* had absolutely nothing to do with the issue petitioners are raising here. *Lorance* was cited for the proposition that plaintiffs' proof of intentional discriminatory adoption of a seniority system was an "element of any Title VII action challenging a seniority system rather than an affirmative defense", and the "fact that a seniority system had a discriminatory impact is not alone sufficient to invalidate the system . . ." (Appellees' Supplemental Brief, No. 88-6141 (5th Cir.) pp. 12-13).

The court of appeals, far from embracing any view relating to pre-Act discrimination based on *Lorance, did not cite Lorance at all!* In fact, the only relevant decision was made by the court of appeals in 1988, before *Lorance* was decided. In 1989, the Court summarily dismissed this issue—"This contention [that a pre-act seniority system which discriminated will make an otherwise bona fide post-act seniority system illegal] was rejected in our earlier opinion . . ." (11a-12a). The mystery of *Lorance's* claimed impact on the *Bernard* court and its supposed conflict with *Teamsters* and its progeny, is heightened by petitioners' suggestion that the *Lorance* court, in holding that the charge in that case was untimely, utilized "language which could conceivably be construed to call into question this aspect of *Teamsters, Bazemore v. Fri-*

day, 478 U.S. 385 (1986)[16] and *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982)." (Petition, p. 49). At peril of appearing unimaginative, we must confess that after repeated readings of *Lorance*, we cannot solve the puzzle of what language petitioners reference. (Perhaps significantly they fail to cite to the opinion.) We respectfully suggest that *Lorance* does not address the issue petitioners raise and this represents yet another example of the invention of an issue which simply does not arise either from this record or from the precedent petitioners invoke.

III. THE FIFTH CIRCUIT'S DECISION REGARDING STIPULATION 29 DOES NOT RAISE ANY ISSUE UNDER *PULLMAN-STANDARD V. SWINT*, 456 U.S. 273 (1982).

Petitioners here, again, take their own misunderstanding of the record and torture it into a "conflict" with existing precedent. Initially, petitioners represent to this Court that the district court's finding that Stipulation 29 altered lines of progression and increased productivity, was so "palpably false" that its "correctness . . . is not seriously at issue . . ." (Petition, pp. 51-52). Petitioners state, "In the subsequent appeal, respondents declined to defend or refer to this mistaken finding and the Fifth Circuit properly did not credit it." *Id.* at 52. These statements are plainly and simply a misrepresentation of the record. The multiple findings of fact (rather than finding)[17] that petitioners purport to summarize were aggressively and re-

16. Petitioners' use of *Bazemore*, at pages 44 and 45 of the petition is troubling. It should be noted that the case has absolutely nothing to do with seniority systems or § 703(h) but rather related to salary disparities created prior to coverage of the federal employer involved under Title VII and their perpetuation after employer became covered by Title VII. *See id.* at 395. (Brennan J. concurring in part)

17. *See* (139a-147a).

peatedly defended by respondents.[18] Rather than failing to credit these findings, the fifth circuit specifically addressed the same arguments petitioners are making here:

> Plaintiffs contend that the district court misunderstood the import of Stipulation 29, that it was not a measure designed to change lines of progression but simply the promotion of 203 mostly white craft helpers. Plaintiffs go too far in simplifying Stipulation 29: it cannot be observed in isolation, but must be considered in the context of Gulf's reorganization. The district court found that Gulf wanted to simplify the lines of progression through reorganizing, and wanted to increase the number of craft trainees, leading to an increase in a number of persons who were trained to handle all aspects of a craft. (21a) *See also Bernard,* 841 F.2d at 557, 559 and 571, (77a, 85a-88a, 133a).

The court recognized that while the terms of Stipulation 29 did not expressly state the job classifications would be eliminated or lines of progression altered, Stipulation 29's implementation achieved precisely that result. By providing employees within the craft helper classification the opportunity to enter special training programs to become mechanic trainees, Stipulation 29 effectively eliminated the craft helper classifications which, in turn, simplified the lines of progression.

Having established a completely illusory foundation, petitioners then proceed to leap from it to the conclusion that the fifth circuit made an independent finding of fact contrary to *Pullman-Standard v. Swint,* 456 U.S. 273 (1982). They represent that finding to be that: "Gulf . . . wanted to increase the number of craft trainees." (Petition, pp. 53-54). It is significant that there is more

---

18. *See* Brief of Appellee' pp. 8-9. *See also* Appellees' Supplemental Brief, pp. 4, *et seq.;* Appellees' Reply to Appellants' Supplemental Brief, pp. 6-7.

to that sentence than petitioners quote. The important remainder of the sentence was "leading to an increase in the number of persons who were trained to handle all aspects of a craft." (21a). We submit that in no reasonable way can this be viewed as a new finding of fact. It was simply an accurate summary of the trial court's findings of fact. The full refutation of petitioners' argument requires only a cursory review of the relevant portions of the record.

Petitioners go on to rest their argument on the fact that "Gulf's own witnesses uniformly insisted that the company had too many employees" and that "Gulf's major labor problem in this era was a *surplus* of inefficiently used employees . . ." (Petition, pp. 54-55). All that is true. In fact, that is the factual background which as the district court indicated, spawned Stipulation 29. (139a-147a).

The primary purpose of Stipulation 29 was to eliminate just that "surplus of inefficiently used employees." The implementation of Stipulation 29 dramatically reduced the number of workers required to perform a given job, partly because the top craftsman was able and was permitted to do the work assignments previously reserved to the craft helpers. The impact of this change is graphically demonstrated by defendants' Exhibit 88, which has been attached in the appendix to this brief. This exhibit prepared by Dr. Fox, defendants' industrial organization expert, shows that Stipulation 29 could reduce the crew required to do a standard job from nine workers to three. (T675A-676A). Once this is understood, the cost effectiveness purpose of the "universal mechanic" becomes obvious as does the economic imperative behind Stipulation 29.

Again, petitioners attempt the creation of an issue for certiorari. The relevant findings were properly made by the trial court and endorsed by the court of appeals. There

is no issue under *Pullman-Standard v. Swint,* 456 U.S. 273 (1982).

IV. THE FIFTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *TEXAS DEPARTMENT OF COMMUNITY AFFAIRS V. BURDINE,* 450 U.S. 248 (1981).

The court of appeals directly met the argument that Gulf's reason for not promoting Mr. Hayes or Mr. Brown was only asserted through arguments of counsel. It stated:

> The issue was not merely raised in the arguments of counsel, . . . for there is ample evidence in the record to support the district court's finding:
>
> 1. Mr. Hayes and Mr. Brown each testified that they had told no one in authority of their interest in becoming supervisors;
> 2. Mr. Draper testified that employees were invited to inform supervisors of their interest in promotion;
> 3. There was no evidence that all employees wanted to become supervisors; and
> 4. Mr. Brown's testimony indicated he knew how to express interest but he chose to remain silent. (40a).

It is difficult to define the parameters of petitioners' argument, but they do not dispute there was evidence in the record from which the findings of fact of the trial court resulted. Apparently, they suggest a new rule of law which would permit a trial court's finding to be held clearly erroneous, despite the presence of substantial supporting evidence, on the basis that no reason was specifically labeled as the reason for the employer's decision. Beyond being a remarkable exception to normal standards for applying Rule 52, the principle that petitioners attempt to extract from *Burdine* has little to do with *Bur-*

dine or this record. The district court found the record clearly spoke for itself regarding the reasons for non-selection. (173a-178a); (247a-252a). The failure of Mr. Hayes and Mr. Brown to express an interest resulted in the decisional process never being triggered. Under such circumstances, it is illogical to require Gulf to produce a witness to articulate the reason for its decision where the record shows clearly that there was no decision made—Gulf simply did not know the petitioners were interested. *See* 172a-178a; 203a.

Further as the court of appeals noted, petitioners mistake the mandate of *Burdine*:

> In meeting its burden of production, Gulf did not have to prove what its reasons were; it simply had to produce evidence that 'raise[d] a genuine issue of fact as to whether it discriminated against Hays and Brown. *Burdine,* 450 U.S. at 254-255, 101 S. Ct. at 1094-1095. (38a-39a).

Burdine deals with evidence, not warnings about the impact of that evidence. Petitioners complain that they could have refuted such evidence as pretextural if they had been warned of its effect. (Petition, pp. 60-62). There was no mystery about the testimony summarized by the court of appeals above, and if petitioners failed to comprehend and react to that evidence at trial, we respectfully suggest that that was an error of counsel, not of the fifth circuit or the trial court.

Petitioners attempt to escape that conclusion by taking the position "the decision of the fifth circuit is squarely inconsistent with the decision of the court of appeals in *Lanphear v. Prokop,* 703 F.2d 1311 (D.C. Cir. 1983)." (Petition, p. 63). This is a "red herring." The egregious fact situation in *Lanphear* has nothing in common with the issues in *Bernard.* In *Lanphear,* the entire case and the subsequent appeal was tried by the employer on the

basis that "poor performance" was the sole reason for the employment action taken. *Id.* at 1315-1316. For reasons apparently known only to the district court, it went on a frolic and detour and entered judgment for the employer on the ground that the employer wanted "new faces and wanted to remove most if not all of the incumbents." *Id.* at 1316. The court of appeals observed that the evidence not only showed this ground had no causal connection with the employment action taken but further was "never put forward as a justification by the MSPB either before this court or below. In fact, the MSPB has expressly disavowed it . . ." *Id.*[19]

There is simply no parallel here. There was never any misrepresentation as to Gulf's position on this issue. There was no reliance on other grounds that would have misled petitioners. Gulf did not either present a "moving target" or "conceal the target altogether." *Id.* Petitioners simply failed to prudently react to the evidence.

The conclusion is inescapable that *Bernard* is consistent with *Burdine* and that the purported "conflict" with *Lanphear* is an illusion.

CONCLUSION

The petition for writ of certiorari should be denied.

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19. While the *Lanphear* court did not expressly so state, the more orthodox holding would have been to find that the district court's operative finding was clearly erroneous which the court apparently did by implication. *See Id.* at 1316.

Respectfully submitted,

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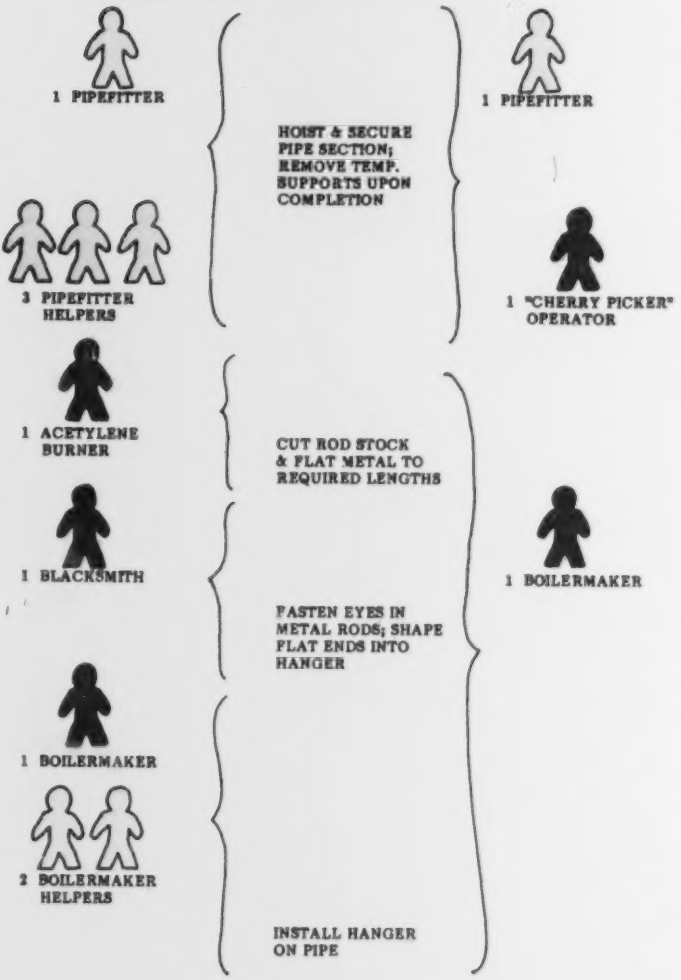
APPENDIX

CREW REQUIRED TO INSTALL A SECTION OF 4-INCH PIPE IN AN OVERHEAD PIPE RACK BEFORE AND AFTER STIPULATION 29



TOTAL CREW NEEDED

DEFENDANT'S EXHIBIT 88

Supreme Court, U.S.
FILED
JUN 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

(4)

No. 89-1617

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1989

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Petitioners,

v.

GULF OIL CORPORATION, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

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ARGUMENT

The decision of the court of appeals below was premised in large measure on the law announced in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989). Respondents argue that Wards Cove mandated a decision in their favor because "the

standard . . . applied in Wards Cove . . . was the rejection of . . . those cases which had applied the strict 'business necessity' standard." (R. Br. 7).[1] Respondents also emphasized that Wards Cove changed the burden of proof, exempting them from any obligation to prove that their tests satisfied even the new Wards Cove substantive standard. (R. Br. 8).

Since the certiorari petition in this case was filed, committees of both the Senate and House of Representatives have approved legislation overturning this Court's decision in Wards Cove. (S. 2104; HR 4000). Section 4 of both bills would expressly reestablish a "business

---

1 See also id. at 6 (court below properly refused to apply pre-Wards Cove standard requiring test be "necessary to business goals of safety and efficiency"; "Judge Reavley opted to apply [a less stringent] standard rather than the business necessity standard.")

necessity" standard, and both bills would specifically return to employers the burden of proof as to business necessity. The full Senate is expected to begin momentarily consideration of this legislation. We have lodged with the clerk copies of the House and Senate bills, as reported by the respective committees, and of the Senate committee report. Under these circumstances we suggest that the Court defer action in this petition until the beginning of the next term.

Conclusion

The Court should defer action on this petition until October Term, 1990.

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